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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1980

(BEGINNING OF TERM)

OCTOBER 6, 1980, THROUGH FEBRUARY 10, 1981

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.[1]
WILLIAM FRENCH SMITH, Attorney General.[2]
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.[3]
ALEXANDER L. STEVAS, Clerk.[4]
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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*For notes, see p. IV.

NOTES

[1] Attorney General Civiletti resigned effective January 19, 1981.

[2] The Honorable William French Smith, of California, was nominated to be Attorney General by President Reagan on January 20, 1981; the nomination was confirmed by the Senate on January 22, 1981; he was commissioned on January 23, 1981, and took the oath on the same date. He was presented to the Court on January 26, 1981 (see *post*, p. LXIII).

[3] Mr. Rodak retired as Clerk of the Court on January 16, 1981. See *post*, p. LXI.

[4] Mr. Stevas was appointed Clerk of the Court effective January 17, 1981. See *post*, p. 1105.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.*:

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE DOUGLAS*

TUESDAY, NOVEMBER 18, 1980

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to the late Justice William O. Douglas.

Mr. Solicitor General McCree addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The members of the Bar of the Supreme Court of the United States meet today to record our respect and admiration for William Orville Douglas, who served with the greatest distinction as Associate Justice for 36 years and 6 months, longer than any Justice in the history of the Court. In these Resolutions, we wish to memorialize his career and contributions to the law and the jurisprudence of this Court.

I

Justice Douglas was appointed to the Court by President

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*Justice Douglas, who retired from active service on the Court effective November 12, 1975 (423 U. S. IV, VII), died in Washington, D. C., on January 19, 1980 (444 U. S. III, VII). Services were held at the National Presbyterian Church, Washington, D. C., prior to his interment in Arlington National Cemetery on January 23, 1980.

Franklin D. Roosevelt to succeed Justice Brandeis. He was sworn in by Chief Justice Hughes on April 17, 1939. He was barely 40 years old.

Douglas' birthplace was the small town of Maine, Minnesota, but his early life, through college, was spent in the State of Washington. His family roots were in Vermont and Nova Scotia; his early life was ruggedly Western and storybook American. His father, a Presbyterian minister, died when Douglas was only five years old, and the young Douglas' life was marked by the hard work necessitated by inadequate family finances.

His college experience was at Whitman College in his home state. Despite the lack of funds, he made his way to Columbia University in New York City and managed to support himself by a variety of jobs. He received his LL. B. degree from Columbia in 1925, graduating second in his class. From 1925 to 1927, he was an associate in the prestigious New York law firm headed by Paul D. Cravath; and it is typical of Douglas that at the same time he was engaged in satisfying the relentless demands of that position, he was also teaching at Columbia Law School.

The brief period of law practice in the Cravath firm was not happy for Douglas; but his subsequent career, including his work as a Justice of this Court, provides evidence that it honed his skills at an early date and furnished a focus for his initial interests in the law. He soon resigned his position at Cravath's and went back to his native Yakima, Washington; but after a brief and unsatisfactory experiment in practicing small-town law, Douglas returned to New York City and in 1927 became an assistant professor on the Columbia Law School staff.

His field of interest was business law, reflecting the insecurities of his precarious economic background; but even in this apparently pedestrian area, he soon demonstrated that safe and familiar paths were not for him. Among his fellow faculty members were some restless men of remarkable intellectual power, originality and daring who were profoundly

dissatisfied with the conventional "trade-school" character of law school research and teaching. They demanded that research and teaching at the law school should be oriented with the materials of life; that they be grounded in the actual problems of society; and that the resources of other disciplines should be utilized in the study and formulation of the law. As Douglas describes the movement, the rebels were "dubbed the leaders of 'sociological jurisprudence.'" [1]

Douglas quickly allied himself with this group, and when in the spring of 1928, the President of Columbia designated a new Dean of the Law School who was unacceptable to them, Douglas, along with some of his colleagues, resigned from the faculty, and Douglas accepted an offer to join the faculty of the Yale Law School as assistant professor. The young Robert Hutchins had become Dean of that school and had commenced its revitalization along lines strikingly similar to those which had been advocated by the Columbia insurgents.

Douglas' career at Yale remained solidly rooted in business law—but with a vast difference from the conventional approach to the study and teaching of the subject. As he did throughout his working life—at the Securities and Exchange Commission and on this Court—he sought, first and last, to find the realities of problems and their social, economic and human impact. He was neither pro-business nor anti-business; neither pro-establishment nor anti-establishment. He sought the facts; he pursued reality; his guiding objective was to sharpen the tools of the law and the art of the lawyer so that they would relate to the real world, and to criticize and mold them so that they would serve their conceded purposes: fairness, honesty and responsiveness. To proceed from abstract principle to practice, from doctrine to decision, was anathema to the young professor.

His output was prodigious. With collaborators, he published a series of books completely reorganizing the teaching and study of business law. They included business as well

[1] Go East, Young Man, p. 160.

as legal materials, assembled and organized on a "functional" basis. He wrote and published scholarly articles and book reviews; he originated and pursued, with the collaboration of a sociologist, elaborate, detailed field investigations of business failures in a number of jurisdictions; in 1929–1932, he conducted a study of bankruptcies for the Yale Institute of Human Relations and the Department of Commerce; in his never-ending search for the materials of real life in his chosen field, he instituted a collaborative teaching and research program with the Harvard Business School.

It is interesting, in view of his later career, that Douglas' prodigious output and his intense activity during these years, including years of social and political ferment in the Nation, were substantially devoid of any indication of interest in professional matters or social problems outside of his chosen field of business affairs.

II

By 1933, Douglas' reputation as an innovative and brillant expert in the field of business was firmly established. It was inevitable, therefore, that in the early days of the New Deal he would receive a call to Washington. In 1934, at the request of SEC Chairman Joseph P. Kennedy, Douglas became Director of the SEC's study of reorganization and protective committees. In his hands, this study became a thorough inquest into the aftermath of large corporate failures. It furnished the dramatic foundation for Douglas' subsequent achievements at the SEC and established his reputation as a formidable and effective figure in Franklin Roosevelt's government.[2]

In January 1936, at age 37, he was appointed a Commissioner of the SEC. Promptly, in a number of speeches, he began to call for reforms in the securities markets and the investment banking community. In September 1937, he was appointed Chairman of the SEC, succeeding James Landis.

[2] See Securities and Exchange Commission, "Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees" (U. S. G. P. O., 1937–38).

He served in that post for 18 months, until his appointment as Associate Justice. Within a few weeks after assuming the chairmanship of the SEC, he launched his remarkable effort to reorganize the New York Stock Exchange, a reform which he regarded as the core requirement of raising the standards of the financial markets. He prosecuted the program with vigor, daring and astuteness. Aided by events, chief of which was the Richard Whitney scandal, Douglas achieved remarkable success.

In this struggle, as throughout his career, Douglas evidenced the profound influence of Justice Brandeis' philosophy, a philosophy which articulated conceptions that Douglas, as a small-town Westerner, found to be entirely congenial. His SEC career demonstrated Douglas' restless refusal to confine his work within established patterns which did not meet the rigorous standards that seemed to him to be called for; and it evidenced his independence, relentless courage and fierce dedication to achievement of the objectives that he formulated. He was not a follower; he regarded the existing state of affairs not as a prescription for comfortable continuity, but as a summons for improvement. In deciding upon objectives and plotting his course, he sought neither collaborators nor participants; rather, after cold and surgical analysis, he independently formulated his positions and struck out boldly to achieve his goal. The extraordinary fact, however, is that he coupled these highly individualistic traits with shrewd, practical sense which enabled him to achieve, to a remarkable degree, acceptance of his ideas and implementation of his programs. They were frequently programs which initially appeared impossibly visionary; but his political and practical acumen, coupled with his burning intensity and ability to enlist loyal support, enabled him to win a surprising degree of acceptance.

In his chosen field, Douglas was a superb technician. His practical experience was limited; but the cutting edge of his mind, his insistence upon the assembly of fact, fact, fact; and his extraordinary capacity for work, enabled him to master

the intricacies of corporate finance and securities trading and the dynamics and mechanics of business and finance. But to him, learning was not an invitation to acceptance; it was an avenue to questioning, to challenge, and a summons to reform practices and institutions to meet his stern standards of upright conduct and efficient result.

III

Douglas' great career as SEC Chairman ended when, in April 1939, he began his long career as an Associate Justice of this Court. There was little reason in his career to that date to anticipate that he would soon become a leader in the vindication of human rights. There was every reason to predict that he would become the Court's expert in cases involving business, and that, in this role, he would insist upon strict standards of probity, fairness and responsibility. He quickly demonstrated the latter.

During his first full term on the bench, he wrote for the Court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106 (1939), to hold that reorganization plans under the Bankruptcy Act for financially distressed corporations must comply with an "absolute priority" rule. Each successive class of creditors and stockholders, in the order and amount of their liquidation priorities, must be fully compensated in new securities of the reorganized corporation before anything could be given to a junior class. This was their contract among themselves and with the corporation; and fair dealing demanded that the contract be honored.[3]

In succeeding terms of the Court, Douglas wrote many opinions for the Court and a number of dissents in cases

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[3] In two cases in subsequent terms, Douglas characteristically buttressed the "absolute priority" rule by insisting upon standards for valuation which provided some assurance that the new distribution of shares and interests to stockholders and creditors would be realistic—that is, based upon prospective earnings. *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 525–526 (1941); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 540 (1943).

involving business affairs. In all of them, his technical proficiency is evident; but successively, his opinions in business cases demonstrated the widening of his horizons. More and more, his opinions for the Court and in dissent referred to the writings and philosophy of Justice Brandeis, and included not only an insistence upon fair dealing, strict performance of contract obligations, and a concern for the interests of investors, but also an evolving tendency to take into account more general public interests. For example, his landmark opinion for the Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), substantially adopted the Brandeis-Holmes view of ratemaking, and he insisted that "the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."

His memorable dissent in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 535–536 (1948), is a Brandeisian essay on the subject of bigness. His early opinion in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221 (1940), holding that a combination to fix prices was illegal per se under the Sherman Act, similarly exhibited his aversion to the use of aggregated power and his commitment to the Brandeisian ideal of independent, competitive business entities.

Again, in majority and dissenting opinions, announcing a theme which he had advocated in his days as a law school professor, he demonstrated that he would strictly apply statutory principles to inhibit or discourage the extension of the control of the "money trust" over American business—a theme for which he acknowledged indebtedness to Justice Brandeis.[4]

The emergence of Justice Douglas as the great civil libertarian is a fascinating story. When he first became a member of the Court, his colleagues were Chief Justice Hughes and Justices McReynolds, Butler, Stone, Roberts, Black, Reed and Frankfurter. In 1940, Butler was succeeded by

[4] See Directors Who Do Not Direct, 47 Harv. L. Rev. 1305 (1934); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 636 (1953) (dissent); *Blau* v. *Lehman*, 368 U. S. 403, 419–420 (1962) (dissent).

Frank Murphy; in 1941, McReynolds and Chief Justice Hughes were succeeded by Roosevelt's nominees, Byrnes and Jackson; and in 1943, Rutledge was appointed to succeed Justice Byrnes who had resigned after a short tenure. Douglas' longest association had been with Justice Frankfurter, dating to the days when they were law teachers; but their friendly personal relationship had been colored by the strong differences between the Young Turks of the Yale Law School and the less ebullient law faculty at Harvard, led by Frankfurter. For this reason, and perhaps more importantly, by reason of temperament and background, it quickly occurred that Douglas' closest association among his colleagues was not with Justice Frankfurter, but with Hugo Black. Douglas and Black early found common ground which they generally occupied until the 1960's when their positions on significant civil rights issues diverged.

Douglas has been quoted as saying that it takes a dozen years on the Court for a Justice's judicial philosophy to mature. There is no evidence that his period of maturation was so long, but in his early years on the Court, his votes in several civil rights cases were later to be regretted and repudiated by him. An early test came in the *Gobitis* case in 1940,[5] a case challenging the expulsion from public school of two children of the Jehovah's Witnesses sect for refusal to comply with a flag-salute ordinance. The Court rejected the challenge and sustained the ordinance. Only Justice Harlan F. Stone dissented. Frankfurter wrote the Court's opinion and Douglas, as well as Justices Black, Murphy and Reed—the other Roosevelt appointees—joined. Two years later, in *Jones* v. *City of Opelika*,[6] in which the Court held that the imposition upon Jehovah's Witnesses of a licensing fee for solicitation sales of their literature was constitutional, Black, Douglas and Murphy, dissenting, confessed that *Gobitis* was wrongly decided. Both *Gobitis* and *Opelika*, in their view,

[5] *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940).
[6] 316 U. S. 584 (1942).

wrongly approved a "device" which "tends to suppress the free exercise of a religion practiced by a minority group." [7]

Similarly, in 1942, Justice Douglas joined in a decision which, in effect, reaffirmed the ruling in *Olmstead* v. *United States*, 277 U. S. 438 (1928), that warrantless wiretapping did not violate the Fourth Amendment.[8] Douglas agreed with the majority, which included Justice Black, despite the fact that Chief Justice Stone and Justices Frankfurter and Murphy dissented and indicated their readiness to overrule *Olmstead*.[9]

These early votes, which are anomalous in view of Justice Douglas' later positions, may be explained on a variety of possible grounds: New Justices often are inclined to accept the views of the majority in areas in which they do not consider themselves expert; Douglas' views in the area had not fully developed; and he was following the lead of Justice Black and other Justices whom he respected.

Douglas' votes in the Japanese internment cases, which also appear somewhat anomalous in view of his subsequent history, may have a different or additional basis. In 1943, he voted with the majority in condoning the indiscriminate internment of Japanese; a year later he joined Justice Black's majority opinion sanctioning exclusion of a Japanese from his home town in California. In his separate opinion in the 1943 case, he explained his vote: It was wartime; Pearl Harbor had been bombed; and Douglas was unwilling to "sit in judgment on the military requirements of that hour." [10]

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[7] *Id.*, at 623. In 1943, the Court reversed *Gobitis*. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

[8] *Goldman* v. *United States*, 316 U. S. 129 (1942) (use of detectaphone).

[9] In 1952, Douglas, in dissent, urged that both *Olmstead* and *Goldman* should be overruled. *On Lee* v. *United States*, 343 U. S. 747, 762 (1952). Fifteen years later, the Court accepted the views urged by Douglas in *On Lee*. *Katz* v. *United States*, 389 U. S. 347, 353 (1967).

[10] *Hirabayashi* v. *United States*, 320 U. S. 81, 106 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944). He later characterized the decisions in the two cases as "extreme"; and in 1944, in the *Endo* case, he

Soon, however, Justice Douglas found his stride and began the establishment of his position as an undeviating champion of individual rights. His conception of individual rights was comprehensive. As he ultimately formulated it, the "Blessings of Liberty" included not only physical security, but *"autonomous control over the development and expression of one's intellect, interests, tastes, and personality"* and *"freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."* [11] He maintained that all of these were sternly and broadly guaranteed by our Constitution and that the Court was their ultimate guardian; and he rejected what he regarded as the artificial and labored distinctions which could be drawn by nice analysis of the words of the Constitution or differentiations between the Constitution's mandates and prohibitions directed to the federal and state governments, respectively.

His insistence upon judicial action to vindicate this sweeping conception of constitutional guarantees met bitter opposition from members of the public who were opposed to the social, economic and political implications of Douglas' insistence upon pervasive individual rights, and from those who feared or challenged the unconventionality of his jurisprudence. But the time was appropriate for newly revealed constitutional values. Douglas' bold ideas were launched during the 1940's, 50's and 60's, at a time of ferment and revolutionary change in societal mores. A wave of suppression, typified by Senator Joseph McCarthy, was eventually met and overwhelmed by a tide of insistence upon individual rights and individual permissiveness; the pressures of egalitarianism, with its accompanying insistence upon the divine right of each individual, were enormous; and Douglas' ex-

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wrote for the Court that the Government could not continue to detain a Japanese-American after her loyalty had been established. *Ex parte Endo,* 323 U. S. 283 (1944).

[11] Separate opinion concurring in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973). 410 U. S., at 211.

alted conception found a ready and receptive constituency. It is perhaps this phenomenon of history—the fact that Douglas' positions coincided with vast social changes—rather than successive changes in the membership of the Court, that accounts for the remarkable degree to which his innovative views became accepted constitutional doctrine and national principle. It may be that Douglas' views would not have met with comprehensive acceptance by the Court if it had not been for changes in its membership; but it is equally likely that the succeeding Court would not have embraced the full measure of libertarian principles if it had not been for the pioneering of Justice Douglas.

Douglas was largely responsible for the establishment of the right of privacy as a distinct value protected by the Bill of Rights. Literalists may complain that the Constitution does not refer to a "right of privacy"; but to Douglas, principle and essence are controlling, and the "right of privacy" is a statement of the essence of the specific constitutional guarantees. Certainly, its recognition as a distinct right is useful and seminal. It is a dramatic embodiment of Douglas' insistence that our Constitution's protection of individual rights is comprehensive and is not to be confined to a narrow literal parsing of its words.

In 1952, the Court held that a municipal transit company could broadcast radio programs, including commercial announcements, on its buses and streetcars. In his dissenting opinion, Douglas asserted that the right to "liberty" as used in the Fifth Amendment, "mean[s] more than freedom from unlawful governmental restraint; it must include privacy as well . . . . The right to be let alone is indeed the beginning of all freedom." [12] This is obviously a doctrine of vast implications, incorporating, by a stroke of creative conceptualism, the comprehensive view of constitutionally guaranteed liberties which Douglas was later to formulate.[13]

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[12] *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 467 (1952).

[13] Concurring opinion in *Roe* v. *Wade* and *Doe* v. *Bolton*, *supra*, n. 11.

Douglas was later to invoke the principle of privacy in a variety of circumstances dealing with governmental actions affecting individuals.[14] The boldest use of the "right" appeared in 1965, when Douglas wrote the opinion of the Court in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), which invalidated a Connecticut law forbidding the use of contraceptives. Douglas' opinion "for the Court" based the decision squarely upon the right of privacy. He argued that the right of privacy exists by necessary implication from specific provisions of the Constitution; that "its existence is necessary in making the express guarantees fully meaningful" (*id.*, at 483).[15] As concurring opinions in *Griswold* contended, the grounds for the Court's decision could have been formulated on a less enterprising basis; but the support which the Court's opinion provides for a distinct, constitutional right of privacy is significant. Using that newly articulated right as a specific instrument or as an aid to broaden the literal words of the Bill of Rights, the application of the Constitution's specific guarantees of individual liberties could be substantially expanded.

A kindred doctrinal innovation which Douglas propounded is the right to travel, a "right" which unlike the "right to privacy" had little or no antecedents in the Court's opinions. In 1941, the Court held that California's "Okie" law was an unconstitutional burden on commerce. Douglas concurred, but on the grounds that the right to travel was a guarantee of citizenship under the Fourteenth Amendment's privileges and immunities clause.[16] Twenty-seven years later, in

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[14] See, *e. g.*, *Wyman* v. *James*, 400 U. S. 309, 326, 329 (1971), in which Douglas, in dissent, invokes the privacy of the home as demonstrating the unconstitutionality under the Fourth Amendment of inspection of a welfare recipient's house.

[15] He elaborated this proposition by a picturesque literary flight: that "specific guarantees in the Bill of Rights . . . have penumbras, formed by emanations from those guarantees that help give them life and substance" (381 U. S., at 484).

[16] *Edwards* v. *California*, 314 U. S. 160, 177 (1941).

Shapiro v. *Thompson*,[17] a majority of the Court recognized the right to travel as "fundamental" under the Fourteenth Amendment.

In a number of other instances, Justice Douglas had the satisfaction of participating in Court decisions adopting principles which he had first articulated in dissent. Conspicuous among these are decisions dealing with the scope of the right to counsel, as to which Douglas shared Justice Black's views. In *Crooker* v. *California*, 357 U. S. 433, 441 (1958), Douglas had dissented from a decision of the Court sustaining the conviction of a defendant on the basis of a confession made without counsel, after five or six hours of interrogation. In a concurring opinion in 1961, *Culombe* v. *Connecticut*, 367 U. S. 568, 637 (1961), he urged that the Court should accept the principle "that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

Gradually, beginning with *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and culminating in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court adopted Justice Douglas' views on the matter as it did in many other areas: Once an individual is "taken into custody or otherwise deprived of his freeedom in any significant way," he must be advised of his Fifth Amendment right to be silent and of his Sixth Amendment right to counsel, by appointment of a lawyer by the state, if necessary; and if the person apprehended indicates that he wants an attorney, all interrogation "must cease until an attorney is present."[18]

Similary, Douglas, in 1942, joined Justice Black in dissent

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[17] 394 U. S. 618 (1969).

[18] 384 U. S., at 478–479, 474. See also Douglas' opinion for the Court in *Hamilton* v. *Alabama*, 368 U. S. 52, 54–55 (1961) (right to counsel at arraignment), and the Court's decision, in which Douglas joined, in *White* v. *Maryland*, 373 U. S. 59 (1963) (preliminary hearing in advance of arraignment is a "critical step in a criminal proceeding" at which defendant must have counsel).

from the Court's decision upholding a state conviction despite the denial of counsel at trial, *Betts* v. *Brady*, 316 U. S. 455, 474 (1942). More than 20 years later, they had the satisfaction of participating in the overruling of this decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).[19]

In 1951, Douglas alone noted his dissent from the Court's order affirming a decision upholding the Virginia poll tax, *Butler* v. *Thompson*, 341 U. S. 937 (1951). In 1966, he wrote the Court's opinion holding, under the equal protection clause, that a state could not impose a poll tax as a condition of voting. *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966).

Justice Douglas' opinions in the right to counsel cases, as in other cases where he alone or in conjunction with others expanded judicial enforcement of procedural rights in criminal cases, illuminate his characteristic approach. Typically, the cases involved indigents and the underprivileged; and to Douglas, their predicaments were a summons to close scrutiny of the process by which government imposed penalties upon them. It was the meaning, the essence of the situation presented, that to him was the essential premise from which conclusions followed.[20] By contrast, the approach of Justice Black, his colleague and collaborator for many years, was more conventional; Black was a strict constructionist of the words of the Constitution, who proceeded to conclusions drawn, by his lights, from carefully considered analysis of the meaning of the words of the Constitution. Students of the Constitution and the judicial process will find this difference in approach, coupled with a long-term—but not complete—coincidence of conclusions, a fruitful source of analysis and speculation.

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[19] *Cf.* Douglas' opinion for the Court in *Haley* v. *Ohio*, 332 U. S. 596 (1948) (confession of 15-year-old after ordeal of questioning without counsel).

[20] See his opinion for the Court in *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), holding unconstitutional, as a violation of equal protection, the Oklahoma statute providing for compulsory sterilization of criminals after a third felony conviction.

This is not to say, however, that Douglas' pioneering represented departures from the precepts of the Constitution. The remarkable degree to which his conclusions were eventually adopted by the Court, and the fact that they have largely withstood the test of time, provide evidence of their harmony with our basic law. Indeed, it may be said that his preconceptions were those which animated our Constitution, and that his conclusions were immanent in that document. Nor can it be said that he was heedless of the need, commanded by the rule of law, to justify conclusions by doctrine. The point is that he did not hesitate to articulate, and proceed on the basis of, doctrines which he formulated, sometimes with piercing originality. The process, to him, was consistent with and mandated by the magnificent generality of the basic provisions of our Constitution and their essential purpose.

His intense insistence that the individual in confrontation with the power of the state must be accorded the fullest protection of the Constitution, is manifest in the votes that he cast as a member of this Court. He believed that the guarantees to the accused in criminal prosecutions were "not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well." [21] And so, he strongly objected to the dilution of the Fifth Amendment's privilege against self-incrimination by requiring testimony where "transactional" or "use" immunity was granted.[22] The privilege is a fundamental barrier to state oppression, and a symbol and manifestation of the ultimate sovereignty of the individual, and Douglas fiercely opposed its diminution. Similarly, aware of Justice Brandeis' admonition that "in the development of our liberty insistence upon procedural regularity has been a large factor," [23] he opposed the narrow application of the Fourth

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[21] *Ullman* v. *United States*, 350 U. S. 422, 440, 445 (1956) (dissent).
[22] *Kastigar* v. *United States*, 406 U. S. 441, 466 (1972) (dissent).
[23] *Burdeau* v. *McDowell*, 256 U. S. 465, 477 (1921).

Amendment's prohibition of the invasion of the individual's domain by unreasonable searches and seizures.[24]

In the controversies involving the First Amendment, Justice Douglas established his position as an uncompromising advocate of the broadest interpretation of the freedoms of speech, the press and religion. Building on a view expressed by Justice Stone,[25] Douglas, along with Black, asserted that the First Amendment's freedoms were in a "preferred position" in our constitutional scheme; and they insisted that state as well as federal action infringing upon basic rights must be subjected to strict scrutiny.[26] Street orators denouncing the President; [27] racists uttering libelous abuse of blacks and abusively criticizing the Court itself; [28] Communists circulating radical propaganda [29]—all were entitled to the shield of the First Amendment. If their utterances provoked listeners to throw stones and bottles, it was the duty of the police to protect the speaker from the crowd and not vice versa.[30]

Douglas was troubled by the question whether this right to speak freely should be limited by the "clear and present danger" test. As early as 1949, he made clear his view that the danger must rise "far above public inconvenience, annoyance or unrest," *Terminiello*, 337 U. S., at 4. In 1957, he stated his own version of the test: that the First Amendment guarantee of freedom of expression is absolute and can be qualified only when the expression "is so closely brigaded with illegal action as to be an inseparable part of it." *Roth*

[24] *E. g., McCray* v. *Illinois*, 386 U. S. 300, 314 (1967) (dissent); see also his eventual position on wiretapping and his views on the right to counsel, discussed above.

[25] *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938).

[26] See *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Poulos* v. *New Hampshire*, 345 U. S. 395, 422 (1953) (dissent); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

[27] *Feiner* v. *New York*, 340 U. S. 315, 329 (1951) (dissent).

[28] *Beauharnais* v. *Illinois*, 343 U. S. 250, 284–287 (1952) (dissent).

[29] *Dennis* v. *United States*, 341 U. S. 494, 581, 589–590 (1951) (dissent).

[30] *Terminiello* v. *Chicago*, *supra*.

v. *United States*, 354 U. S. 476, 508, 514 (1957). Eventually, in 1969, he announced that, at least in time of peace, he had "great misgivings" about the "clear and present danger" test because he believed that it had been wrongly applied "by judges so wedded to the *status quo* that critical analysis made them nervous." *Brandenburg* v. *Ohio*, 395 U. S. 444, 454 (1969) (concurring).

Where the conflict between freedom and the societal interest in the avoidance of physical disorder is not presented, Douglas' view was absolute: "[t]he First Amendment is couched in absolute terms—freedom of speech shall not be abridged," *Beauharnais*, *supra*, note 28, at 285; "The matter is beyond the power of the legislature to regulate, control or condition," *Poulos*, *supra*, note 26, at 423. Censorship of movies or written material, in his judgment, is absolutely prohibited by the First Amendment.[31] Teachers may not be subjected to loyalty tests or dismissed for membership in alleged subversive organizations.[32] His belief in open advocacy and debate also induced in him an unwillingness to tolerate governmental actions which, in his view, shielded governmental action—even Presidential acts—from public scrutiny.[33]

In the 1960's, Douglas' broad view of the scope of First Amendment protection for the expression of views resulted in significant differences with Justice Black. Black refused to vote to invalidate a conviction under state trespass laws of students who demonstrated in front of a county jail where

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[31] *Byrne* v. *Karalexis*, 396 U. S. 976, 977 (1969) (dissent); *cf.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (dissent); *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146 (1946).

[32] *Adler* v. *Board of Education*, 342 U. S. 485, 508 (1952) (dissent).

[33] *E. g.*, he joined the Court's decision in the Pentagon papers case, *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), and he regarded the Court's action, which he joined, approving a lower court order compelling President Nixon to surrender tape records of conversations, *United States* v. *Nixon*, 418 U. S. 683 (1974), as of great importance. See J. Simon, Independent Journey, The Life of William O. Douglas, 429 (1980).

some of their fellow protestors against segregation were incarcerated. Douglas dissented. *Adderley* v. *Florida,* 385 U. S. 39 (1966). Douglas' insistence that symbolic expression was equally entitled to protection with verbal expression was unacceptable to Justice Black in the 1960's. This was evident in Black's dissent from the Court's opinion, in which Douglas joined, holding that students could not be dismissed from a public school for wearing black armbands in class to protest the Vietnam war. *Tinker* v. *Des Moines Community School District,* 393 U. S. 503 (1969). And in *United States* v. *O'Brien,* 391 U. S. 367, 389 (1968), Douglas dissented from a Court decision in which Justice Black joined, sustaining a conviction for the burning of a draft card. Later, in *Brandenburg* v. *Ohio, supra,* at 450, Douglas, concurring, stated that the Court's decision in *O'Brien* "was not, with all respect, consistent with the First Amendment" (395 U. S., at 455); O'Brien's act, he said, was protected by the First Amendment as a "symbolic protest" (*id.,* at 456).

Black and Douglas, however, had never wavered in their solid resistance to the pressures of McCarthyism which were formidable in the loyalty cases. In 1951, the Court had held invalid the Attorney General's compilation, without notice or opportunity for rebuttal, of a list of subversive organizations affiliation with which was grounds for dismissal from federal employment under President Truman's executive order. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123 (1951). On the same day, by a four-to-four decision, the Court left standing the dismissal from government service of Dorothy Bailey on the basis of membership in organizations on the Attorney General's list and the undisclosed statement of anonymous informers.[34] Both Black and Douglas wrote separate, concurring opinions in the *Joint Anti-Fascist* case; Douglas' opinion is especially significant because he expressly criticized the result in the *Bailey* case which, he said, presents "an excellent illustration of how dan-

[34] *Bailey* v. *Richardson,* 341 U. S. 918 (1951).

gerous a departure from our constitutional standards can be." 341 U. S., at 179–180.

Justice Douglas believed that the First Amendment established an impenetrable barrier between the government and religious establishments and beliefs. From the early years of his tenure as a Justice of this Court, he voted "no" as to religious instruction or prayer in public schools; [35] he voted "no" to government loan of textbooks to parochial schools; [36] and in 1970, he alone voted to strike down the tax exemption for property used solely for religious purposes.[37]

He believed that racial segregation was an evil and that the Court should be vigilant and resourceful in finding that segregation, by whatever means and wherever it occurred, in public or private places, violated the equal protection clause of the Fourteenth Amendment; [38] and he early and steadfastly insisted that laws burdening the right of suffrage to the prejudice of the underprivileged were constitutionally intolerable. See, *e. g.*, *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952).

In this area, as in all other matters affecting the liberty and dignity of the individual, history may well agree that Chief Justice Marshall's tribute to the Court over which he presided is applicable to Justice Douglas: that he "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required." [39]

Finally, as we survey the remarkable career of Justice Douglas, we acknowledge with gratitude and reverence his extraordinary contributions in other fields—in addition to the

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[35] *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County, Ill.*, 333 U. S. 203 (1948); *Engel* v. *Vitale*, 370 U. S. 421 (1962).

[36] *Board of Education of Central School District No. 1* v. *Allen*, 392 U. S. 236, 254 (1968) (dissent).

[37] *Walz* v. *Tax Commission*, 397 U. S. 664, 700 (1970) (dissent).

[38] *E. g.*, *Palmer* v. *Thompson*, 403 U. S. 217, 231 (1971) (dissent); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 179 (1972) (dissent).

[39] Quoted in Justice Frankfurter's dissent, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 668 (1943).

law—to the preservation and development of freedom in our Nation and to the evolution of constitutional principle. Our survey has been confined to Justice Douglas' career in the law. The sheer volume of his output during his 36 years on the Court is overwhelming; but it does not measure his activities during that time. It is an extraordinary fact that, simultaneously, he was in the vanguard of other great causes. He was a world traveler who, in a number of impressive publications, alerted the Nation to the problems and aspirations of the people of the less developed parts of our planet, which have become a central fact in the life of our Nation and the world. He was a prophet and pioneer with respect to environmental concerns; his activities and writings were of early and signal importance in developing programs for the protection of our forests, rivers, streams and mountains.

In a real sense, his myriad activities were intertwined. He was deeply aware that our freedoms are dependent not only upon the quality of our understanding of constitutional principles and their faithful and relentless application, but also upon our interrelationship with the other peoples of the world, and upon the quality of the land in which we live. All of these concerns he accepted as personal challenges to himself, to his understanding, his energy, and his ability and willingness to risk the consequences of unconventionality. To him, the existence of a problem was a challenge to probe its depth and composition, and a summons to devise and advocate a solution.

As a Justice, he did not hesitate to stand alone;[40] he was not intimidated by harsh criticism or the stridency of the McCarthyites; as an environmentalist, in eloquent language, he insisted that not only national policy, but the courts should respond to the call to preserve our natural heritage.[41] As a world citizen, passionately devoted to peace, he was

[40] *E. g.*, the stay of execution that he granted in the *Rosenberg* case, *Rosenberg* v. *United States*, 346 U. S. 273, 313 (1953).

[41] See *United States* v. *Reserve Mining Co.*, 419 U. S. 802 (1974) (dissent from denial of application to vacate stay); and *Sierra Club* v. *Morton*, 405 U. S. 727, 741 (1972) (dissent).

ready to test the limits of Presidential power to engage in military operations.[42]

WHEREFORE, it is RESOLVED that we, the Bar of the Supreme Court of the United States. express our profound sorrow that Associate Justice William Orville Douglas is no longer with us; we express our deep gratitude for his outstanding and original contributions to the evolution of constitutional doctrine; and our admiration and appreciation of his unfailing courage and his insistence upon the principles that he considered to reflect the genius of our Constitution and the highest aspirations of our people. We record our acknowledgment of his participation as a constructive leader in three of the great issues of our time: The expansion of human rights and liberty, the protection of the environment, and the recognition of the rightful demands of the less privileged people of the world. We are grateful to him for providing his example of fearless dedication which has inspired us and will inspire future generations of lawyers and judges; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General, and I recognize the Attorney General of the United States.

Mr. Attorney General Civiletti addressed the Court as follows:

MR. CHIEF JUSTICE and may it please the Court.

The Bar of the Court met today to honor the memory of

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[42] *Holtzman* v. *Schlesinger*, 414 U. S. 1316 (1973) (the Cambodian bombing) (Douglas, acting alone, granted stay); see, also, his dissents from denial of certiorari to review legality of the Vietnam war: *e. g.*, *Sarnoff* v. *Schultz*, 409 U. S. 929 (1972); *Mitchell* v. *United States*, 386 U. S. 972 (1967).

William O. Douglas, Associate Justice of the Supreme Court from 1939 to 1975.

In the 36 years during which Mr. Justice Douglas served on the Court, this Nation emerged from an economic depression, fought a World War and two other serious armed conflicts, struggled to eliminate race prejudice and its pervasive effects, came to recognize the threat that unthinking and ravaging industrial production posed to its ecological systems, and faced increasing complexities in its social life that tested its political and economic institutions. All of these problems came before this Court in one form or another, and Mr. Justice Douglas was always ready to confront them. He brought to them a brilliant mind, open to ideas and creative solutions; but he rejected any approach that appeared to be out of harmony with the liberties rooted in the Bill of Rights. He brought to these contests a prodigious energy: he was not only the most prolific author of opinions ever to sit on the Court, but also the author of over thirty books on a wide variety of subjects. But most of all he brought to this work a great passion and the courage and ability to express it for us and for those to come after us.

Early in his tenure on the Court he made important contributions in the area of economic regulation—as might have been expected in light of his experience as an attorney with a Wall Street firm, as a director of bankruptcy studies at Yale Law School, and as a member, and then Chairman, of the Securities and Exchange Commission. His opinion for the Court in *Pepper* v. *Litton*, 308 U. S. 295 (1939), most clearly displays the strength of his views concerning the obligations of corporate fiduciaries. In that opinion, which upheld the challenge of an independent trustee in bankruptcy to a claim based on a judgment against the bankrupt corporation collusively procured by the dominant stockholder, he emphasized the breadth of the fiduciary obligation owed by a corporate officer. That standard of conduct, he wrote, "is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." *Id.*, at 307.

Mr. Justice Douglas was the author of numerous other opinions construing the federal Bankruptcy Act, including careful and detailed treatments of complicated problems involving railroad reorganizations in *Meyer* v. *Fleming*, 327 U. S. 161 (1946), and *Gardner* v. *New Jersey*, 329 U. S. 565 (1947).

He also made a significant impact on the field of antitrust law. His opinions include *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972), and *Otter Tail Power Co.* v. *United States*, 410 U. S. 366 (1973), and an early opinion, sure to remain bedrock for generations to come—his masterful treatment of price manipulation in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). Until that opinion was handed down, it was supposed by many lawyers and businessmen that agreements that affected price levels but did not literally fix prices were not *per se* unlawful and thus could be defended against Sherman Act charges by proof that the agreement has a benign purpose, such as the elimination of competitive evils. Mr. Justice Douglas scotched that defense in the much quoted holding that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Id.*, at 223. Nearly 30 years later, in *United States* v. *Container Corporation of America*, 393 U. S. 333 (1969), he returned to this subject, writing an opinion for the Court holding that the reciprocal exchange of price information by the corporate defendants in that case violated section 1 of the Sherman Act.

In his *Socony* opinion, Mr. Justice Douglas spoke of the Sherman Act as a "charter of freedom" (310 U. S., at 221), a view that followed from his deep distrust of large concentrations of power having no effective social accountability. In one of the addresses collected in his book titled Democracy and Finance, published in 1940, he expressed the view that the trend toward large corporate combinations threatened

not only our competitive system, individual initiative and freedom of opportunity which was the essence of capitalism, but also other important democratic values. He looked to government as an important source of countervailing power and thus, in decisions such as his opinions for the Court in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944), *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584 (1941), and *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236 (1945) (the latter an Interstate Commerce Commission case), he expressed a willingness to accord broad powers and discretion to the independent administrative agencies as they sought to carry out congressional mandates to protect the public interest in the matters regulated by those agencies.

But Mr. Justice Douglas was by no means an uncritical advocate of government regulation of American life. He was, above all, the champion of the individual, and in many of his most memorable opinions—notably those grounded on the First Amendment—he emphasized the importance of maintaining space, free from government interference, in which each individual can express his views, enjoy his privacy, and live his life according to his own lights. Maintaining this freedom was essential, he believed, not only for the benefit of each individual, but also for the health of society as a whole. Thus in *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949), upholding the right of a speaker to express views that angered a crowd gathered outside the auditorium in which he spoke, Mr. Justice Douglas observed that "[t]he vitality of civil and political institutions in our society depends on free discussion [; and the] right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes." And he added provocatively: "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." In his

dissent in *Dennis* v. *United States*, 341 U. S. 494 (1951), speaking out against convictions under the Smith Act for what he regarded as the mere act of teaching Marxist-Leninist doctrine and organizing others to do the same, he expressed the belief that the "airing of ideas releases pressures which otherwise might become destructive," and that in an atmosphere of free and full discussion, false ideas will be exposed and will "gain few adherents" (*id.*, at 584).

Mr. Justice Douglas' belief that the First Amendment also guaranteed a right of individual privacy and that this too was essential to a healthy society was in no way inconsistent with his vision of a robust, lively, and diverse America, for it was the heavy hand of government meddling in areas protected under the First Amendment that he opposed, not the babble and jostle of crowds in public spaces. Perhaps his best known opinion concerned with this right is *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), recognizing a "zone of privacy created by several fundamental constitutional guarantees" (*id.*, at 485), and prohibiting government intervention in the sensitive and personal decisions of married couples concerning procreation. But the note was struck earlier in his dissent in *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952), a case concerned with the Commission's approval of a public transit system's practice of broadcasting radio programs consisting of musical selections and commercials in streetcars and buses. To Mr. Justice Douglas, this was government-approved coercion of a "captive audience" (*id.*, at 468), not only an intrusion on the transit riders' private ruminations but a form of regimentation; for some centralized official body was choosing the programs rather than leaving it to the people to make their own choices between "competing entertainments" (*id.*, at 469).

If Mr. Justice Douglas spoke frequently in dissenting opinions and in concurrences that bore his unique, unmistakable imprint, he sometimes spoke prophetically, setting forth a view that would eventually command a majority of the Court. Thus his dissent on the Fourth Amendment warrant

issue in *Frank* v. *Maryland*, 359 U. S. 360 (1959), bore fruit in the Court's opinions in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), and *See* v. *Seattle*, 387 U. S. 541 (1967); and he dissented on the Fifth Amendment self-incrimination issue in *Cohen* v. *Hurley*, 366 U. S. 117 (1961), subsequently overruled in *Spevack* v. *Klein*, 385 U. S. 511 (1967), in which he wrote the plurality opinion. His dissent in *South* v. *Peters*, 339 U. S. 276, 277 (1950), from the Court's *per curiam* opinion, which held that a constitutional challenge to Georgia's county unit system presented a political issue as to which the District Court properly withheld relief, was later vindicated in this Court's reapportionment decisions.

In the brief time we have here, it is not possible to discuss all of the areas in which Mr. Justice Douglas has made contributions. In his long tenure on the Court he dealt with the full range of issues that came before it, making significant contributions in cases concerning civil rights, securities regulation, the military and the selective service system, and in cases coming within the Court's original jurisdiction. But no discussion of Mr. Justice Douglas' career would be complete without reference to his concern for the environment. In his dissenting opinion in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972), a case concerned with the highly technical doctrine of standing, he explained why, in cases involving environmental issues, he would accord standing to anyone representing "the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers" (*id.*, at 741)—valleys, alpine meadows, groves of trees, and rivers, all of them essential to the survival of fish, birds, and wildlife (*id.*, at 743). In this opinion, Mr. Justice Douglas spoke out again in favor of nurturing a diverse community but here he extended the community to include all forms of life—"the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams" (*id.*, at 752). This dissent lacks the significance in the development of the doctrine of standing that his opinion for the Court in a case such as *Barlow* v. *Collins*, 397 U. S. 159 (1970), enjoys; but it stands as a

reminder both of the source from which he drew much of his strength and inspiration and of the distinctive voice of a man unafraid to step to the music of a different drummer.

MR. CHIEF JUSTICE, in the name of the lawyers of this nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented to you in honor and celebration of the memory of the late Mr. Justice Douglas be accepted by this Court.

THE CHIEF JUSTICE said:

Thank you, Mr. Attorney General and Mr. Solicitor General, and on behalf of the Court I particularly thank you for these splendid resolutions summarizing the career and in memory of our late colleague and friend, Justice Douglas.

We ask that you convey to the members of the Committee on Resolutions our deep appreciation of their very appropriate presentation here today.

Your motion, Mr. Attorney General, that these resolutions be made part of the permanent record of this Court is granted.

Justice Douglas' long tenure on this Court, without more, sufficed to make him a unique figure in the Court's annals. In his 36 years on the Court our country experienced massive and pervasive changes in its social, political, and economic structure. Worldwide conflicts disturbed and altered American life, leaving in their wake mountains of intractable problems.

During this long tenure on the Court Justice Douglas participated in more than one-fourth of all the reported cases in this Court since 1790, a record, as you have pointed out in your resolutions, unparalleled. But more important even than the volume is the nature of the issues the Court was called upon to deal with during this period. You have mentioned some of the specific cases and specific issues.

Bill Douglas and I were colleagues on the Court for six years, and even during that short span the Court was confronted with some of the most vexing and sensitive and com-

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plex issues in the history of the Court. Disagreement on such issues is of course the norm. It has always been so, and always will be under our system. Indeed, it is imperative that this be the case, for a pattern of unanimity is alien to democratic institutions.

I share with others great respect for his keen mind, his unwavering commitment to his own beliefs, and his zest for grappling with new problems. All of us were the beneficiaries of his unparalleled firsthand knowledge of a multitude of past decisions of the Court, and in conferences now we miss his verbal footnotes describing the details of the evolution of many of those decisions.

Bill Douglas lived life to the fullest in the manner of the rugged individualists who opened this continent, people he admired so much. The opening of this continent was a task for strong, independent, assertive, vigorous, creative, and imaginative people. The words I have just used really describe Bill Douglas. He exemplified them. He exemplified all these qualities.

As we know, his adventurous, questing spirit led him all over the world. He traveled in order to experience the beauty of the natural environment, and to understand other people, to probe into their ways of life, to learn of their suffering and of their aspirations. In one of our many visits in my chambers over a cup of tea he said once that his travels throughout the world had given him a better understanding of the grandeur and majesty of the American democratic idea and ideal, of our commitment to freedom, and the success of our Constitution. He shared the conviction of his friend, Henry Steele Commager, that nothing in all history succeeded like America.

Few Justices of this Court in our history sought more, I think, to press for reexamination of established patterns and accepted perceptions of our social and economic and political structure. His lifelong pursuit of his own ideals demonstrates that people of imagination and courage who feel deeply, as he did, and who act on their beliefs, as he did, are

those who make others think and rethink conventional beliefs. With Justice Holmes he believed that to live life fully one must share in the passions and actions of his time. And long before the word "ecology" had found its way into the popular vocabulary he was, as both the Attorney General and the Solicitor General have told us, an ardent student of conservation, and an advocate of the preservation of the gifts of nature.

Those of us who live by the Potomac, indeed, all of the people of this country, owe a debt to Bill Douglas for his protests and his efforts which saved the Chesapeake and Ohio Canal from what he called "the roar of the wheels and the sound of the horns." Due largely to him the Canal was preserved and declared a National Historic Park. And many of us here today were present when the Canal was dedicated in his name, pursuant to an Act of the Congress.

In his fourscore years, Bill Douglas climbed many mountains; not just the visible mountains on our continent and other continents, but mountains of the law and mountains of ideas, economic, social, and political. Like so many restless, dynamic, inquisitive human beings, he left trails of his philosophical and his physical explorations so that others may share them and, if they wish, follow his trail.

Some aspects of Bill Douglas' image, his public image—in part, at least—reflect the distortions inherent in modern life, and the penchant to put public figures into immutable slots. He was called a godless atheist and a leftist activist. But of course, as we well know, he was neither. He had strong views as to how to preserve the freedom of the private enterprise system from even some of its own flaws.

He was a deeply religious man, but religious in his own way, and not in any orthodox pattern. His range of moods reflected the range of his interests in life, and that covered virtually all of the human condition. Sometimes like a comet, as we know, he would flare and as quickly subside. But his intimates who understood him relished the light and ignored the heat.

He was unconcerned about his public image. In fact, I think, he took no little delight in confounding his critics. The ill-advised and, happily, short-lived thrust at an impeachment naturally disturbed him as it would disturb any man, and he properly resented it. But even on that his concern was not for long. At times he could have explained himself and warded off some of the hostility that was aimed at him from time to time, but for various reasons, he declined to do so.

I sometimes wondered whether or not he chafed in the inescapably monastic life on this Court, and longed really to be in the rough and tumble of the political arena or the business world, where he could let himself go giving blows and warding them off. He took a pixie delight sometimes in baiting his critics into even more violent hyperbole, and with a good writer's skill he used hyperbole to make his own points.

There were many fields of human activity in which Bill Douglas would have made a notable mark in life. In the world of business, as I suggested; in politics; in education; perhaps even in science. His exuberant, dynamic energies spilled far beyond the stately processes of the judiciary and into many other areas of American life as we know. And we are all richer for his sojourn here.

As I did in paying respects to him at the time of his death, I recall to you now, in closing, something he said near the end of his active career on this Court. Here are his words.

"I think the heart of America is sound. I think the conscience of America is bright, and I think the future, the future of America is great."

His words should give heart to all of us as we face the future and remember his rich life.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE REED*

MONDAY, DECEMBER 15, 1980

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, AND JUSTICE STEVENS.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our colleague, the late Justice Stanley Reed.

The Solicitor General is recognized at this time for the purpose of presenting those Resolutions which were adopted by the Bar. Mr. Solicitor General.

Mr. Solicitor General McCree addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The members of the Bar of the Supreme Court of the United States have met today in this Court to record our high esteem and affection for Stanley Forman Reed, who served with exceptional distinction as an active Associate Justice during 19 years, from January 31, 1938, until his

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*Justice Reed, who retired from active service on the Court effective February 25, 1957 (352 U. S. IV, XIII), died in Huntington, N. Y., on April 2, 1980 (445 U. S. III, V). Services were held at Trinity United Methodist Church in Maysville, Ky., prior to his interment in the Maysville Cemetery on April 8, 1980.

retirement on February 25, 1957, and after his retirement continued for many years to render notable service to the judicial system and to the country.

On the occasion of Justice Reed's retirement in 1957, Chief Justice Warren, speaking on behalf of the Court, emphasized the fact that Justice Reed had served with 4 Chief Justices and 18 Associate Justices, "all of whom became indebted to him in their joint work of the Court for the wide range of his knowledge, the depth of his wisdom, and the warmth of his personality." Chief Justice Warren said that Justice Reed had "established himself in the hearts of all of us" and had "made a significant contribution to American constitutional law."

Justice Reed lived into his 96th year. His remarkable longevity exceeded that as yet attained by any other Justice in the history of the Court. It is one consequence of his full life that we now find ourselves assessing his contributions with the sharpened perspective permitted by the passage of nearly a quarter of a century since his retirement. Time has brightened our appreciation of his fine qualities and our understanding of the wisdom which he brought to the judgments he made in discharging his responsibilities on the Court throughout a period marked by substantial shifts in emphasis in both constitutional and statutory doctrine. The tributes bestowed in 1957 were well deserved. We add our hearty endorsement today—and, in passing along to future generations of the Bar our sentiments concerning this wise and good man, we give renewed expression of the strong bond of affection for Justice Reed which was always felt by those of us who knew him best.

Stanley Reed was born in Minerva, Mason County, Kentucky, on December 31, 1884, and died at Huntington, New York, on April 2, 1980. He was the son of Dr. John A. Reed, a practicing physician, and Frances Forman Reed. After early schooling Stanley entered Kentucky Wesleyan College, which was then located at Winchester, Kentucky, and he was graduated in 1902. He went on to Yale University for a second bachelor's degree, conferred in 1906. He next studied

law successively at the University of Virginia Law School, at Columbia University Law School and at the Sorbonne law faculty in Paris, without however taking a formal law degree at any one of these institutions. Meanwhile, in 1908, he married Winifred Elgin, of Maysville, the county seat of Mason County, Kentucky, and when they returned from the year at the Sorbonne he read law in the office of a lawyer, in accordance with a practice still common in those days. (He and Robert H. Jackson were the last of the Supreme Court Justices, thus far at least, not to have a law degree.) He was admitted to the Kentucky Bar in 1910, and began to establish a law practice in Maysville. In 1912, and again in 1914, he was elected to the Kentucky Legislature as the representative from Mason County. During World War I he served as a First Lieutenant in the United States Army.

He found law practice challenging and congenial. He was a friendly man, interested in people and their problems, and interested in the economic growth and well-being of the region where he lived. As his clients and friends came to know and to respect the wisdom of his advice, his practice broadened, with the mix of agriculture, mercantile, transportation, property and personal matters that came to a good lawyer in that part of Kentucky.

For about 20 years he continued his practice in Maysville. One of his clients was the Burley Tobacco Growers Association, a substantial cooperative engaged in marketing the crops of its members. His experience in this relationship was a contributing factor in his appointment by President Hoover in 1929 as General Counsel of the Federal Farm Board, a newly formed federal agency directed toward farm credit and the marketing abroad of United States agricultural surpluses. The move to Washington was one of only about 500 statute miles, but it involved an enormous change of environment. He was obliged to leave the neighborhood and local concerns of the Maysville he loved and to concentrate on the issues of national importance which were to dominate the remainder of his life; Stanley Reed made the transition quickly and with notable ease.

In December 1932, near the end of the Hoover Administration, Stanley Reed became General Counsel of the Reconstruction Finance Corporation, which was embarking on a massive program to help rescue the country from the depression, and he served in that important position until March 1935. As General Counsel of the Reconstruction Finance Corporation, which was a creditor subordinate to gold-clause bondholders in a railroad reorganization, he in January 1935 joined Attorney General Cummings in arguing the Gold Clause cases in the Supreme Court (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240). In this litigation, which he liked to describe as the biggest lawsuit in history because it affected amounts estimated from 75 to 100 billion dollars, he successfully warded off attacks on the validity of the gold-clause legislation that was a keystone of our developing monetary policy.

Thus Stanley Reed was no stranger to the Department of Justice or to the Court when on March 18, 1935, President Roosevelt nominated him to be the Solicitor General of the United States. Within three days the nomination was confirmed by the Senate and on March 23, 1935, he took up his duties as Solicitor General at a time of unusual turmoil and excitement in the development of our national institutions and in the testing of our governing constitutional principles.

Solicitor General Reed discharged his duties as the Government's chief advocate with distinction. It was a distinction which rested upon an earthy and a solid foundation, one consisting of a capable and organized intelligence which first mastered and then clearly explicated the matter at hand.

His service as Solicitor General came during the most intense constitutional crisis that the Nation had experienced since the Civil War. It was a period sometimes characterized as a constitutional revolution, though he would have called it, persuasively, a constitutional restoration. The Government, and indeed the legal order itself, were fortunate in having so steady a hand at the controls when the very foundations of national power were in the balance. He directed the Government's appellate litigation and argued a major share of the constitutional cases—though in that

spacious time, when an hour per side was the normal allotment and two hours were commonly allowed in the more important cases, he sometimes shared the argument with colleagues within the Department or in the agencies involved.

His qualities were those most needed at the time. Without artifice or the embellishment of rhetoric, with simplicity and candor of statement, with dignity, earnestness, and a hard-earned command of the record, drawing on briefs that amassed the relevant industrial and economic facts, Solicitor General Reed clearly won the confidence and respect of the Court, if not always a majority of the votes.

One corollary to this careful approach to his job was a high degree of personal participation in the briefs which bore his name. Preliminary papers, on certiorari or appeals, were reviewed by him in page proof. Briefs on the merits were reviewed, searchingly rather than perfunctorily, before printing. Briefs in important cases (which arose in some profusion in those times) were discussed and developed around his desk.

In the 33 months of his service as Solicitor General, Stanley Reed argued 18 cases, reported in the 295th to the 303rd United States Reports. For a time during this period it seemed as if the basic constitutional powers of Congress to tax and to regulate commerce among the states, would be rendered inadequate to deal with the deep-seated problems of the national economy and welfare. Stanley Reed lost his arguments for the validity of the National Industrial Recovery Act and of the Agricultural Adjustment Act (*Schechter Corp.* v. *United States*, 295 U. S. 495; *United States* v. *Butler*, 297 U. S. 1) but so, in 1935, would Demosthenes assisted by Daniel Webster. In cases argued for the Government by others, the Bituminous Coal Act, and, most singular of all, the Railroad Pension Act, likewise succumbed to attacks on constitutional grounds (*Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330). But before the close of his term as Solicitor General the constitutional foundations of national power had been recovered.

Solicitor General Reed successfully argued, or shared the

argument, in the cases upholding the National Labor Relations Act (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49), the cases interposing barriers of standing which substantially immunized from attack the Public Works and Tennessee Valley legislation (*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464), and the cases starting the Court's retreat from the overblown application of the doctrine of intergovernmental tax immunities (*James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co.* v. *Tax Commission*, 302 U. S. 186; *Helvering* v. *Therrell*, 303 U. S. 218).

To these landmarks may be added his winning arguments in the case sustaining the windfall income tax, which recovered the agricultural adjustment processing tax refunds from those who had already recouped from their purchasers (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337), and in the case sustaining the Executive Agreement provisions transferring private expropriation claims against the U. S. S. R. to the United States (*United States* v. *Belmont*, 301 U. S. 324), along with his unsuccessful defense of President Roosevelt's removal of a Federal Trade Commissioner from office (*Humphrey's Executor* v. *United States*, 295 U. S. 602). Probably no other attorney has plunged so deeply into the basic law of our Nation in so short a time.

Success as Solicitor General was not measured by victories alone, crucial as those were for the future course of our national life. Stanley Reed was conscious of an obligation to help in rationalizing the law, apart from particular outcomes. He, as others in this high office, was careful never to seek victory for its own sake and he avoided making arguments which he considered deleterious to the law.

Solicitor General Reed served nearly three years in that office. In January 1938, the retirement of Justice Sutherland offered President Roosevelt his second appointment to the Court. It was fitting that he chose the chief advocate for his Administration. Stanley Reed was nominated and, after only

10 days, then confirmed. The Congressional Record for January 25 reports the debate in full: "Without objection, the nomination is confirmed." He took his seat on the bench on January 31, 1938. A few days earlier, Justice Stone had written to Professor Felix Frankfurter:

> "I am quite happy about Reed's appointment. He is honest, straightforward, and a hard worker, and I think a good lawyer. The Court ought to get many years of good service from him when he settles into the new job."

Justice Reed was in active service on this Court for more than 19 years, from his 54th to his 73rd years. At his retirement he had served for one-ninth of the history of this Court. He wrote a total of 339 opinions, which will be found in the 303rd to the 352nd of the United States Reports. Of this total there were 231 (a little over two-thirds) written for the Court, and 20 concurring opinions and 88 dissenting opinions. Their subject matter touches upon virtually everything that arises within the wide range of the Court's business. Assessed as a whole, and even when read again a quarter of a century later, their quality is high. The style tends to be steady and clear; the flow of the argument usually is carefully developed; the scholarly and legislative materials are skillfully used, without being allowed to become smothering; and there is sufficient brevity to help assure that the opinions will be read by a wide audience and readily understood.

The issues to which Justice Reed directed his opinions came in all shapes and all sizes. They could be as simple as his first opinion, holding that a bankruptcy commissioner was not personally liable because he paid for the cost of growing and harvesting crops given as security (*Adair* v. *Bank of America Assn.*, 303 U. S. 350), or as complex as the milk orders issued by the Secretary of Agriculture under the Marketing Agreement Act of 1937 (*United States* v. *Rock Royal Co-Op.*, 307 U. S. 533). They could address issues as elusive as the close question of statutory construction whereby, for a 4–3 majority, he held that the Texas City disaster fell outside the scope of

the liability which the Congress had imposed on the Government by the provisions of the Federal Tort Claims Act (*Dalehite* v. *United States*, 346 U. S. 15), or as precise as, in his final opinion for the Court, whether the Federal Black Bass Act, forbidding transportation contrary to state law, reached to violations of state administrative regulations (*United States* v. *Howard*, 352 U. S. 212). They could seem, at least by hindsight, to reach a result as inevitable as the decisions sustaining the Federal Communications Commission's rules adopted for the purpose of avoiding overconcentration in the broadcasting industry (*United States* v. *Storer Broadcasting Co.*, 351 U. S. 192), or outlawing the white primary in Texas (*Smith v. Allwright*, 321 U. S. 649); or they might involve as hard a call as the cellophane antitrust case (*United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377). What is constant in the diversity of his opinions is the care of the exposition, and the patient organization of his march from initial premise to final conclusion.

United States v. *American Trucking Assns.*, 310 U. S. 534, was one of Justice Reed's unusual departures from the conventions of the law. There the Court felt obliged to force the contrary words of a carelessly drafted floor amendment into the result intended by the Congress, as plainly shown by the legislative history. Justice Reed was clear that, in departing from the plain words of the statute, he had entered upon treacherous ground and gave explicit recognition to the "danger that the court's conclusion as to the legislative purpose will be unconsciously influenced by the judges' own views . . . . A lively appreciation of the danger is the best assurance of escape from its threat."

In his relations with his colleagues, with his law clerks and with the members of the Bar, Justice Reed displayed unusual degrees of friendliness, serenity and generosity. Great issues might be at stake; deeply held opposing views might be in stark confrontation—but no matter what the temptation or the provocation, he behaved with unfailing civility and sought always to nurture a spirit of mutual respect.

These qualities in no way meant that he was lacking in abiding convictions on fundamental issues—such as issues involving the distribution of powers between the Federal Government and the States, or the balancing of the interests of the Government and the individual under the Bill of Rights, or the development of limits on the scope of judicial review. He was willing to listen, to consider the views of others, and sometimes to be persuaded by them. But when all the discussion was finished, he had a sense of independent self-assurance which gave him a quiet though firm confidence in the correctness of his own judgments.

Toward the latter part of Justice Reed's tenure the school desegregation cases presented the Court with issues of almost unparalleled importance. The unanimity of all the Justices which found expression in the opinion finally issued in *Brown* v. *Board of Education*, 347 U. S. 483, constitutes perhaps the most dramatic triumph of collegial persuasion in the history of the Court. It is known from historical accounts already published, based on documents and other data available to scholars, that Justice Reed initially felt that the segregated school systems there in controversy were not unconstitutional and that he contemplated the possibility of issuing a separate opinion so stating. But over the Court's long internal consideration of the case he came to acquiesce in the contrary conclusion reached by his brethren and he decided it would be better for the Nation's future if he joined in what would thus become a unanimous opinion.

Justice Reed was throughout his service on the Court its quintessential moderate. His moderation reflected not an indifference to principle, but an aversion to rigid doctrine, and especially to the doctrinaire. His pragmatic recognition that even first principles cannot be pushed to their logical extreme is well shown by *Breard* v. *Alexandria*, 341 U. S. 622. The Court there sustained the "Green River" ordinances, requiring the prior consent of the resident before allowing door-to-door commercial solicitation. Justices Black and Douglas considered application of the ordinances to the sale of peri-

odicals a violation of the First Amendment. Justice Reed replied that it would seem "a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."

So, too, what seems to be a high-water mark during the last half-century for the antitrust rule of reason is found in his opinion for the Court in *United States* v. *Columbia Steel Co.*, 334 U. S. 495. There the Court by a 5–4 vote held vertical integration of a large steel producer with a large fabricator was not *per se* unlawful, but permissible if major competition remained; Justice Reed was not persuaded by the insistence of the dissent that United States Steel Corp. "is big enough."

Stanley Reed had, however, no attachment to moderation in the dispatch of the business for which he was responsible. He was insistent as Solicitor General that his Office should not ask for extensions of time—both as a matter of pride and in recognition that this only served to compress the time available for succeeding matters. He thus inaugurated a tradition that endured in that Office for at least a decade or two.

Justice Reed brought with him to the Court this aversion to delay, and nourished it throughout his service. His first opinion for the Court was delivered 26 days after argument, his last only 39 days after argument. In all, he maintained this expedition as a result of steady and determined workmanship throughout his service on the Court.

Justice Reed had not served out his first year on the Court when he accepted an extracurricular chore of the first importance. On January 31, 1939, President Roosevelt made him Chairman of the President's Committee on Civil Service Improvement. This was a small group of distinguished judges, officials and citizens who were asked to recommend ways to achieve professional excellence in a career civil service. Justice Reed in accepting the assignment was able to crystallize his enduring concern for the excellence of the fed-

eral personnel. The Committee's report, two years later, led to some improvement in respect to most of the professions studied. Its recommendation as to lawyers was the most far-reaching. There, for the two years during which it had the support of the Congress, it produced a spectacular improvement in the systems for recruiting and selecting attorneys. The Reed Committee, as it was then known, was able to combine the energies and wisdom of a strikingly diverse group only because of the consistently gracious leadership of its chairman, experienced both in the professional needs of the Government and in the patient skill required to bring together the widely separated views of strong-willed men.

When he retired from the Court in 1957 Justice Reed was in good health, with the expectation of continuing his activity though on a reduced scale. He wrote to his law clerks:

> "My plans look forward to opportunities for aiding in improvements in the law, its administration, and its adaption to new conditions. After more than fifty years in its study and practice, our Lady of the Law retains my deepest affection."

During the years that followed he delivered some occasional addresses on subjects close to his heart. He performed a constructive role as Special Master in an original action brought in this Court between two States seeking a resolution of their dispute concerning oystering and other fishing in the Potomac (*Virginia* v. *Maryland*, 355 U. S. 946 and 371 U. S. 943). But he found the greatest opportunity for service by sitting from time to time, pursuant to the designations permitted by statute, on panels of judges adjudicating cases in the United States Court of Claims and in the United States Court of Appeals for the District of Columbia Circuit. There his fellow judges had the benefit of his wisdom and his experience; and he took his turn at the writing of opinions. One which should be especially noted deals with the complex subject of the scope of the Government's executive privilege to withhold documents from disclosure in litigation (*Kaiser Aluminum & Chemical Corp.* v. *United*

States, 141 Ct. Cl. 38). He continued to sit until the early part of 1970, though with decreasing frequency, after which he concluded that advancing age made it desirable to retire more definitively.

Throughout his life Stanley Reed kept his intimate ties with his beloved Kentucky. Year after year he and his wife Winifred returned there during the summer to renew old friendships and to make new ones. For many years he retained an interest in a family working farm property in Mavsville, and even in the midst of a busy Court term he would seem to find relaxation and pleasure in going over its operating records and books of account. The pride which his fellow Kentuckians took in his accomplishments never ruffled his modesty; he reciprocated with an expansive warmth of feeling toward them.

Wherefore, it is accordingly

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our lasting and grateful appreciation for the exemplary service rendered by Stanley Forman Reed during his long public career, first in the Legislature of Kentucky, then in the Executive Branch of the United States Government, then as a distinguished Associate Justice of this Court, and later as a retired Associate Justice; that we record our high affection and esteem for him, and our admiration for the qualities of wise judgment, of diligent and perceptive craftsmanship, and of personal generosity and gentlemanliness, which enabled him to be so effective in contributing to the progress of the law and to the betterment of our Nation; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

Submitted by the Committee on Resolutions: Bennett Boskey, Chairman, A. B. Chandler, Clark M. Clifford, Bert T. Combs, John Sherman Cooper, Thomas G. Corcoran, George Clifton Edwards, Jr., Paul A. Freund, Warner W. Gardner,

Bayless Manning, Carl D. Perkins, William D. Rogers, J. Skelly Wright.

The CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. The Court now recognizes the Attorney General of the United States.

Mr. Attorney General Civiletti addressed the Court as follows:

MR. CHIEF JUSTICE and may it please the Court:

The Bar of the Court met today to honor the memory of Stanley F. Reed, who served as an Associate Justice of the Supreme Court from 1938 to 1957.

Mr. Justice Reed was the second Justice appointed to the Court by President Franklin Roosevelt. Like Mr. Justice Black, who immediately preceded him to the Bench, Stanley Reed brought to the Court the perspective of one who helped shape national policy in the service of a coordinate Branch of Government during the New Deal period, an era that transformed American politics, government, and, ultimately, constitutional doctrine. The Reconstruction Finance Corporation, of which he was General Counsel from 1932 to 1935, participated in numerous governmental efforts to revitalize the economy, furnishing loans and equity capital to banks and businesses and providing the essential financial underpinning for New Deal initiatives in such areas as agricultural price supports, rural electrification, housing, and export trade. As General Counsel, Stanley Reed overcame misgivings on the part of the Secretary of the Treasury and rendered a decisive legal opinion supporting the RFC's authority to purchase newly mined gold in furtherance of the Roosevelt Administration's monetary policy.[1] And also while General Counsel, Stanley Reed argued on behalf of the

[1] A. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal* 239 (1958); W. McCune, *The Nine Young Men* 60 (1947).

RFC in the *Gold Clause Cases*,[2] in which the Court upheld the power of Congress to provide that contracts purporting to require payment in gold or particular coin or currency could be satisfied upon payment of any legal tender. His success in the *Gold Clause Cases* no doubt was a significant factor in his being selected, one month later, to be Solicitor General of the United States.

Stanley Reed's tenure as Solicitor General came at the turning point of the most severe testing of congressional power since the days of Chief Justice Marshall, a testing occasioned by Congress' and the Executive's pursuit of extraordinary measures to master the conditions of the Great Depression. In less than three years, he presented the Government's cause, or superintended its presentation, in a series of cases whose very names have come to symbolize the tension that then existed between the political and judicial branches of Government. His argument in support of the National Industrial Recovery Act was rejected by the Court in *Schechter Poultry Corp.* v. *United States*,[3] less than three months after he became Solicitor General. The Guffey Coal Act and the Agricultural Adjustment Act met a similar fate in *Carter* v. *Carter Coal Co.*,[4] and *United States* v. *Butler*,[5] although in the latter case the Court did accept the broad Hamiltonian view, urged by Solicitor General Reed,[6] of Congress' power to tax and spend for the general welfare.

But there were important successes as well, especially toward the end of his tenure. Solicitor General Reed successfully defended the constitutionality of the sale of power by the Tennessee Valley Authority in *Ashwander* v. *TVA*,[7] and, at his urging, the Court unanimously rejected a challenge to the federal financing of municipal powerplants in *Alabama*

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[2] *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935).
[3] 295 U. S. 495 (1935).
[4] 298 U. S. 238 (1936).
[5] 297 U. S. 1 (1936).
[6] 297 U. S., at 16–19, 49–50, 65–67.
[7] 297 U. S. 288 (1936).

Power Co. v. *Ickes.*[8] In *Carmichael* v. *Southern Coal Co.*[9] and *Steward Machine Co.* v. *Davis,*[10] both decided in 1937, the Court sustained the cooperative state and federal unemployment compensation system and, of equal importance, the power of Congress to offer financial inducements to the States to encourage them to participate in federal programs. The congressional policy favoring collective bargaining was broadly affirmed for the first time by the unanimous decision in *Virginian Railway Co.* v. *System Federation No. 40,*[11] also argued by Solicitor General Reed. But perhaps the most significant of his successes was in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,*[12] in which the Court upheld the Wagner Act and, in the process, adopted a more expansive view of Congress' power to regulate interstate commerce than had been reflected in the Court's prior opinions during this period.

Thus, when Stanley Reed was appointed an Associate Justice of this Court in 1938, he of course possessed an intimate knowledge of its procedures, gained through his meticulous attention to the Government's business before the Court. But he also brought to the Court a special sensitivity to the role of the Court under the Constitution and a unique understanding of the processes of government and the great issues of his time.

Consistent with his experience, Mr. Justice Reed generally exhibited a broad view of the power of Congress to address the economic and social needs of the Nation. In his first few years on the bench, he joined in the Court's affirmation of the constitutional principles respecting Congress' authority to regulate interstate commerce that only had begun to emerge in his years as Solicitor General. In *United States* v. *Darby,*[13] for example, Mr. Justice Reed joined the unani-

[8] 302 U. S. 464 (1938).
[9] 301 U. S. 495 (1937).
[10] 301 U. S. 549 (1937).
[11] 300 U. S. 515 (1937).
[12] 301 U. S. 1 (1937).
[13] 312 U. S. 100 (1941).

mous opinion of the Court overruling its decision two decades earlier in *Hammer* v. *Dagenhart*[14] and sustaining the power of Congress to regulate the working conditions of persons who produce goods destined for interstate commerce. In this same area, it was particularly fitting that Mr. Justice Reed should write the opinion for the Court in *United States* v. *Rock Royal Co-Operative, Inc.*,[15] which sustained the authority of Congress to regulate the price and conditions of marketing of agricultural commodities in interstate commerce. The Court held that Congress could regulate local sales of products where those sales are drawn into a plan to protect interstate commerce from the effects of agricultural surpluses[16]—a marked departure from the pronouncement in *United States* v. *Butler* that any regulation of agricultural production was a local matter reserved exclusively to the States.[17] And the Court in *Rock Royal Co-Operative, Inc.*, approved the delegation of authority to the Secretary of Agriculture to maintain orderly marketing conditions, finding that the inclusion of identifiable standards to guide the Secretary sufficiently distinguished the case from *Schechter Poultry*. In another landmark decision under the Commerce Clause, Mr. Justice Reed delivered the opinion of the Court in *United States* v. *Appalachian Power Co.*,[18] which established Congress' authority to regulate the use of navigable waters in all their aspects.[19]

Mr. Justice Reed similarly believed that substantial deference should be given to the judgment of the Executive or of federal agencies where Congress had chosen to rely on their expertise and discretion to implement statutory policy. "It is not the province of a court," he observed in *Gray* v. *Powell*,[20] "to absorb the administrative functions to such an

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[14] 247 U. S. 251 (1918).
[15] 307 U. S. 533 (1939).
[16] 307 U. S., at 568–571.
[17] 297 U. S., at 68.
[18] 311 U. S. 377 (1940).
[19] See *Kaiser Aetna* v. *United States*, 444 U. S. 164, 171–174 (1979).
[20] 314 U. S. 402, 412 (1941).

extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action." But he was equally plain in *Stark* v. *Wickard*,[21] decided several terms later in 1944, that "the responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress."

As Mr. Justice Reed's service on the Court proceeded, issues of race and civil liberties began to overshadow those of the distribution of powers in our federal system. He uniformly voted with the majority in cases involving racial discrimination, including a series of decisions requiring admission of blacks to graduate schools,[22] and, of course, the court's decision in *Brown* v. *Board of Education*.[23] And he wrote the opinion of the Court in *Smith* v. *Allwright*,[24] one of the "white primary" cases, and in *Morgan* v. *Virginia*,[25] finding a state statute requiring racial segregation of passengers traveling interstate to be an unconstitutional burden on interstate commerce.

Mr. Justice Reed's judicial philosophy was more multifaceted in cases involving an accommodation of First Amendment rights and the interests of society. He generally voted to uphold statutes or programs designed to identify or protect against perceived threats to national security.[26] But in other areas, he agreed with Mr. Justice Black and Mr. Justice

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[21] 321 U. S. 288, 310 (1944).

[22] *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938).

[23] 347 U. S. 483 (1954).

[24] 321 U. S. 649 (1944).

[25] 328 U. S. 373 (1946).

[26] See, *e. g.*, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 125–130 (1956) (Clark, J., dissenting); *Pennsylvania* v. *Nelson*, 350 U. S. 497, 512–520 (1956) (Reed, J., dissenting); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 187–213 (1951) (Reed, J., dissenting); *Dennis* v. *United States*, 341 U. S. 494 (1951); *American Communications Assn.* v. *Douds*, 339 U. S. 382 (1950).

Douglas that freedom of expression enjoys a preferred status under the Constitution and he insisted on broad protections for the exercise of that freedom. He delivered the opinion of the Court in *Pennekamp* v. *Florida*,[27] which, building upon the decision in *Bridges* v. *California*,[28] concluded that the press criticism of judicial conduct there at issue did not present such a clear and immediate threat to the administration of justice as to justify "clos[ing] the door of permissible public comment." "When that door is closed," he observed, "it closes all doors behind it." [29]

Mr. Justice Reed would have given broader protection to labor picketing than did the Court,[30] and he cast the crucial fifth vote in *Terminiello* v. *Chicago*,[31] which reversed the conviction of an individual whose speech had created a disturbance. But his decision for the Court in *United Public Workers* v. *Mitchell* [32] demonstrates perhaps as well as any his conviction that due respect for the rights of the individual must take into account the broader interests of society and the proper working of our public institutions. For as important as the First Amendment rights of Government employees were recognized to be, Mr. Justice Reed upheld the legitimacy of Congress' judgment that the cumulative effect of partisan political activity by many public employees would threaten the very democratic system that the First Amendment was intended to serve.

Upon the occasion of his appointment to the bench, the editors of the American Bar Association Journal observed that a key to part of Mr. Justice Reed's legal philosophy

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[27] 328 U. S. 331 (1946).

[28] 314 U. S. 252 (1941).

[29] 328 U. S., at 350.

[30] See, *e. g.*, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 317–321 (1941) (Reed, J., dissenting); *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, 732–739 (1942) (Reed, J., dissenting); *Teamsters* v. *Hanke*, 339 U. S. 470, 481–484 (1950) (Minton, J., dissenting).

[31] 337 U. S. 1 (1949).

[32] 330 U. S. 75 (1947).

could be found in a quotation from an address he had given several years earlier:

> [E]xperience of the last half century has driven us to the realization that, after all, we live in a factual world where organized groups, whether for production, commerce or propaganda, are too powerful to permit the feeble forces of the individual to survive. . . . Regretfully but inevitably we must adjust our lives and our Government to modern needs and find, in a Constitution written for a simpler era, guidance for the problems of our present age.[33]

Mr. Justice Reed believed in the value of organization to counterbalance the forces he perceived to be threatening to the individual—whether it be the organization of farmers in the tobacco cooperative he represented in Kentucky; of working people in the labor unions whose rights he defended before and as a member of this Court; or of the people generally, through their Government, to further the common good. Others, on this Court and elsewhere, may have disagreed with some of his views. But whatever the passions surrounding a particular cause, Stanley Reed brought to the occasion a civility, kindness, fairness, and care that commanded the affection and respect of all who knew him.

Mr. Chief Justice, in the name of the lawyers of this nation and, in particular, of the Bar of this Court, I respectfully request that the Resolution presented to you in honor and celebration of the memory of the late Mr. Justice Reed be accepted by this Court.

The Chief Justice said:

Mr. Attorney General and Mr. Solicitor General, the Court thanks you for your presentations here today in memory of our late colleague Justice Reed.

We ask that you convey to the members of the Committee

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[33] 24 A. B. A. J. 94 (1938), quoting 22 A. B. A. J. 602 (1936).

of the Bar and the Committee on Resolutions, our appreciation for their very appropriate presentation. Your motion that these resolutions be made part of the permanent records of the Court is granted.

Stanley Reed's career as a lawyer, as a Government official, and as a jurist, was a life of consistent, sustained excellence. In his own quiet, unobstrusive, imperturbable, and conscientious manner he rendered most distinguished service to our country in a period of great political and social turbulence.

After he had completed his education at the various universities described in the resolutions, Stanley Reed returned to his hometown of Maysville and both studied and practiced law, and it did not take long for his professional reputation to spread. And although he was a leading Kentucky Democrat, he became Counsel for the Federal Farm Board and then General Counsel of the Reconstruction Finance Corporation in the administration of President Hoover.

By the time President Roosevelt took office in 1933, Stanley Reed's reputation was so firmly established in Washington that he was continued in office. He could, as has been suggested, accurately be described as a moderate, one who believed that much good could be done when Government power is wielded firmly and discerningly in the public interest. As the Attorney General has said, when he became Solicitor General he had already argued one of the Gold Clause cases before this Court, and during the dynamic period that followed 1935 he argued most of the important cases involving the constitutionality of President Roosevelt's New Deal legislation. And in that process, in this Court, at this lectern, he was opposed by some of the finest, ablest lawyers in America.

As Solicitor General his performance was always marked by thoroughness of preparation and his arguments were characterized by clear, down-to-earth presentations, and his tenure embraced, as has been stated, many of the great landmarks of our constitutional law. The pressures on an advocate responsible for so many highly charged cases with one coming on the heels of another finally took their toll,

and on one occasion, in the course of his argument at this lectern, he collapsed. But happily it was from sheer exhaustion, and he swiftly recovered.

Homer Cummings, the Attorney General in Roosevelt's first two terms, once said that Stanley Reed was qualified to fill any post in the Government. And so it came as no surprise, soon after that, that President Roosevelt selected him to succeed Justice Sutherland on this Court. By that time his reputation in the bar of this country was such that the appointment was widely acclaimed. There were those who were quick to predict that Reed, the jurist, would act based upon the work of Reed, the advocate. But when Stanley Reed came to this Bench his conduct fulfilled the great traditions of the Judiciary and his positions as an advocate were set aside, and he was all judge.

As one born and bred a Southern Democrat, he believed with Jefferson that a Court entrusted with the great power of judicial review should not confuse its role with the role and function of the political branches of the Government. It is told that once one of his law clerks suggested to him that he ought to decide cases more often by looking to the desirable solution. But that was not the case for Stanley Reed. The proper function of a Justice, he said, was not to do that. He was not a result-oriented, or a problem-solving judge. And so he sent the errant law clerk to look up the word "kritarchy." The law clerk, on going to several dictionaries, had some difficulty, but finally he tracked down the word in the unabridged Oxford Dictionary and discovered, and I think, perhaps, never forgot the word means "government by judges," which Stanley Reed rejected.

Throughout his judicial career he sought always to restrain himself from reaching desirable results because they harmonized with a particular social philosophy or a personal belief of his own. As one reared in a border State, he made a major contribution in helping this Nation to move toward racial equality and, as has been said already, wrote the opinion in cases where the all-white primary elections and segregation in interstate transportation were held unconstitutional.

He approached the Court's opinion in *Brown* v. *Board of Education* cautiously, because he weighed whether the decision might impede rather than assist race relations in the country, and in his thoughtful and careful way he later called *Brown* the most important decision of this Court in the 19 years he served here.

During that period he authored 231 opinions for the Court, 20 concurring opinions, and 88 dissents. He was a superb colleague, and I can say that from personal experience, as I will indicate. He was devoted to his office, a prodigious, conscientious, painstaking workman.

There was nothing in him of the prima donna. Serious and modest and retiring, he was always courtly. He went about his daily tasks quietly and always serenely. His unfailing courtesy to counsel from this Bench and with his colleagues, his even temper, his dry sense of humor, endeared him to everyone. He was a moderate in all things, and he exemplified the virtues of the true 18th-century gentleman, the epitome of civility.

When he retired from the Court he was in good health, and 72 years of age. And as the Attorney General and Solicitor General have said, it was his lot to live longer after his retirement than any Justice in the history of the Court. And he enjoyed those years, more than two decades, fully. He maintained chambers here in this Court, and like Tom Clark continued to render very important service to other federal courts, and as a Special Master appointed by this Court.

He sat by designation on more than 250 cases in the United States Court of Appeals for the District of Columbia Circuit while I was a member of that court, and he sat on the United States Court of Claims. I had argued cases before him when he was on this Court, but I really came to know him when he sat with us on the Court of Appeals, where he was a regular member of panels for about four years. He maintained chambers at the Court of Appeals, and joined us at the judges' lunch table and often regaled us with stories of Kentucky and of the New Deal days when he was Solicitor General.

He not only lived longer after his retirement than any other Justice but surely no other Justice lived a fuller life than Stanley Reed. It was rich in satisfactions and in the kind of rewards that endure. In our time when the stability of family life has been eroded, we who knew him well know of the joy of his marriage to his hometown sweetheart, Winifred Elgin, and of the pride he took in his two lawyer sons. He often said: "All the success I have had in my life I owe to my wife, the beautiful Winifred." They were married 71 years, and Mrs. Reed survives him.

Kentucky has contributed mightily to the history of this Court. Ten of the 101 Justices who have served, and including those who now serve, were either native or adopted Kentuckians, and that included Stanley Reed's lifelong friend, Chief Justice Vinson. As a Kentuckian he never lost his great affection for his native State. He used to speak of his forebears who, as he once wrote, "[b]efore we were a Nation . . . traversed the wilderness road to the bluegrass country."

He was proud of his Kentucky roots, of his membership in the Kentucky Bar for more than 70 years, of his service in the Kentucky General Assembly. He loved his farm in Kentucky, and he would tell us with a smile that he had worked for 56 years in order to maintain his dairy cows on his farm in the manner to which they had become accustomed.

Stanley Reed smiled often, and in the two decades that I knew him well he and Winifred dined at our home and we dined in theirs. His delights in small, gentle banter is revealed in an exchange in our home when I served him some predinner refreshment that was laced with mint. He asked in that courtly way of his: "Where did this come from, if I may inquire?" And I responded: "Why, of course, the only place where real bourbon is made."

Beginning in the first year when I came to this Court, he came to my chambers about this time or a little later, each year, bearing a package of Kentucky's famous produce, and I in turn would send him a bottle of Bordeaux or Burgundy each Christmas. And with a smile again, as he was wont

to do, he would say, sometimes: "This is tolerable if there is no Kentucky wine available."

As Stanley Reed never forgot Kentucky, Kentucky never forgot him, and he was invited back frequently to speak on a great many occasions. In 1957 his hometown of Maysville observed "Stanley Reed Day" in his honor. The street where he had maintained his law office was named for him.

At his death the Maysville newspaper wrote that "[w]e here as fellow townsmen feel that the Nation was the richer for his shining integrity, and the depth of his wisdom." And surely we here today can share that.

It is appropriate, I think, to conclude our tributes to our colleague with words from a poem written by Alice Roberts on Stanley Reed Day. She wrote this:

"He will go back to quiet lanes
Where cities' hum shall cease,
To walk again the gentle ways,
The paths of rest and peace."

RETIREMENT OF CLERK OF THE COURT

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 12, 1981

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE STEVENS.

THE CHIEF JUSTICE said:

On behalf of the Court, I announce the retirement of our able and trusted Clerk of the Supreme Court of the United States, Mr. Michael Rodak, Jr., as of January 16, 1981. Mr. Rodak has served the Court more than 24 years, and I speak for all of the Members of the Court, and the staff of the Court, and for the Bar of the Court in wishing him much happiness and good health in the years ahead.

It is also my pleasure and I am authorized to announce that Mr. Alexander Stevas has been appointed Clerk of the Supreme Court effective January 16 to succeed Mr. Rodak. Mr. Francis Lorson will become Chief Deputy Clerk of the Court succeeding Mr. Stevas.

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 26, 1981

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE STEVENS.

Mr. Solicitor General McCree presented the Honorable William French Smith, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you as the chief law officer of the Government and as an officer of this Court, and we welcome you to the performance of the very important duties which will rest on you. Your commission as Attorney General of the United States will be placed in the records of the Court, and we appreciate your appearing here this morning.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1980

COLORADO *v.* BANNISTER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 79–1901. Decided October 20, 1980

Shortly after a police officer observed a speeding automobile, he heard a police radio dispatch which reported that a theft of motor vehicle parts, including chrome lug nuts, had occurred in the area, and which described two suspects. A few minutes later, he again spotted the speeding automobile and followed it into a service station for the purpose of issuing a traffic citation. As he approached the car, respondent and his companion stepped out of it, and during an ensuing conversation with the car's occupants the officer observed chrome lug nuts and lug wrenches in plain view in the car. Recognizing that the car's occupants met the description of the suspects, the officer arrested them and seized the lug nuts and wrenches. Before respondent's trial on charges of stealing motor vehicle parts, the trial court granted his motion to suppress the seized items, and the Colorado Supreme Court affirmed.

Held: The circumstances in this case provided probable cause for the officer's seizure of the incriminating items without a warrant. Cf. *Carroll* v. *United States*, 267 U. S. 132; *Chambers* v. *Maroney*, 399 U. S. 42.

Certiorari granted; 199 Colo. 281, 607 P. 2d 987, vacated and remanded.

PER CURIAM.

In the early morning of October 15, 1979, an officer of the Colorado Springs Police Department observed a blue 1967

Pontiac GTO automobile moving along a road at a speed above the legal limit. Before the officer could pursue the vehicle, it disappeared from his sight. Shortly thereafter, the officer heard a police radio dispatch reporting that a theft of motor vehicle parts had occurred in the area he was patrolling in his car. The radio dispatch announced that a number of chrome lug nuts were among the items stolen, and provided a description of two suspects. A few minutes after hearing the report, the officer spotted the same automobile he had seen earlier, still speeding. He saw the car enter a service station, and followed it there for the purpose of issuing a traffic citation to its driver.

As the officer approached the car, both of its occupants, including the respondent, stepped out of it. A conversation between the officer and the respondent ensued, just outside the closed front door of the automobile. At this time, the officer observed chrome lug nuts in an open glove compartment located between the vehicle's front bucket seats, as well as two lug wrenches on the floorboard of the back seat. These items were in plain view, illuminated by the lights of the service station. Recognizing that the respondent and his companion met the description of those suspected of stealing motor vehicle parts, the officer immediately arrested both of them. He then seized the lug nuts and wrenches.

Before the date scheduled for his trial on charges of stealing motor vehicle parts, the respondent moved to suppress the items that the arresting officer had seized. The trial court granted the motion, and its decision was affirmed by the Supreme Court of Colorado.[1] The State subsequently filed a petition for certiorari in this Court.

The provisions of the Fourth Amendment are enforceable against the States through the Fourteenth, and it is axiomatic that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable

[1] 199 Colo. 281, 607 P. 2d 987 (1980).

under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967). One of these exceptions, recognized at least since *Carroll* v. *United States*, 267 U. S. 132 (1925), exists when an automobile or other vehicle is stopped and the police have probable cause to believe it contains evidence of a crime. See *Arkansas* v. *Sanders*, 442 U. S. 753, 760 (1979). *Carroll* upheld the legality of a search that was conducted immediately after a vehicle was stopped. Since *Carroll*, warrantless searches have been found permissible even when a car was searched after being seized and moved to a police station. *Texas* v. *White*, 423 U. S. 67 (1975); *Chambers* v. *Maroney*, 399 U. S. 42 (1970). In each of these latter cases, the search was constitutionally permissible because an immediate, on-the-scene search would have been permissible. *Texas* v. *White*, *supra*, at 68; *Chambers* v. *Maroney*, *supra*, at 52.

At issue in the present case is a seizure that occurred on the scene shortly after a speeding car was stopped. Thus, if there was probable cause "that the contents of the automobile offend against the law," *Carroll*, *supra*, at 159, the warrantless seizure was permissible.[2]

Probable cause in this case is self-evident. Indeed, the Supreme Court of Colorado acknowledged that there was probable cause, but mistakenly concluded that a warrant was required to open the car door and seize the items within.

The officer could not stop the vehicle the first time he

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[2] Another factor that contributes to the justification for the absence of a warrant in such a situation is that "the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable." *Chambers*, 399 U. S., at 50–51. See also *Cardwell* v. *Lewis*, 417 U. S. 583, 595 (1974). This factor applies with particular force in this case. As the reason for the stop was wholly unconnected with the reason for the subsequent seizure, it would be especially unreasonable to require a detour to a magistrate before the unanticipated evidence could be lawfully seized.

detected it speeding, but he accosted it at his next opportunity, when it entered the service station. His subsequent approach to the side of the automobile in order to issue a traffic citation to its driver was entirely legitimate.[3] Standing by the front door of the car, the officer happened to see items matching the description of some of those recently stolen in the vicinity, and observed that the occupants of the car met the description of those suspected of the crime. These circumstances provided not only probable cause to arrest, but also under *Carroll* and *Chambers*, probable cause to seize the incriminating items without a warrant.[4]

The petition for certiorari and the respondent's motion for leave to proceed *in forma pauperis* are granted, the judgment of the Supreme Court of Colorado is vacated, and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

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[3] There can be no question that the stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment. *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556–558 (1976); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975).

[4] The respondent does not dispute that the items seized were illuminated by the lights of the service station, or that they were in the plain view of the officer as he spoke to him beside the front door of the car. There was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants.

Syllabus

HUGHES *v.* ROWE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-6000. Decided November 10, 1980

Petitioner, a state prisoner, was placed in a segregation cell for a violation of prison regulations, was given a hearing two days later, and, after admitting the violation, was sentenced to 10 days' segregation. After exhausting administrative remedies, petitioner brought a federal-court civil rights action against respondent Illinois corrections officers under 42 U. S. C. § 1983. The complaint, which was prepared without the assistance of counsel, raised federal questions concerning, *inter alia*, the initial decision to place petitioner in segregation without a prior hearing. Respondents filed no affidavits denying or explaining the facts alleged by petitioner. The District Court dismissed the complaint without taking any evidence and later ordered petitioner to pay counsel fees under 42 U. S. C. § 1988 for services rendered by the Attorney General of Illinois in representing respondents in the action. The Court of Appeals affirmed.

Held:

1. Although petitioner's allegations as to bias of certain of the officers conducting the disciplinary hearing after his initial segregation, procedural irregularities at the hearing, unequal treatment, and cruel and unusual punishment were properly dismissed for failure to state a claim—even under the controlling principle that a prisoner's complaint prepared without counsel should not be dismissed unless it appears beyond doubt that he can prove no set of facts entitling him to relief—nevertheless the complaint was adequate at least to require some response from respondents, by way of affidavit or otherwise, to petitioner's claim that his initial confinement to segregation violated due process because it occurred without a prior hearing. Segregation without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions. Here, the record did not show that petitioner's immediate segregation was necessitated by emergency conditions, and an administrative regulation authorizing segregation pending investigation of disciplinary matters, where required "in the interest of institutional security and safety," did not justify dismissal of the suit in the absence of any showing that concern for institutional security and safety was the basis for petitioner's immediate segregation without a prior hearing.

2. The award of attorney's fees entered against petitioner was improper. The defendant in an action brought under 42 U. S. C. § 1983 may recover attorney's fees from the plaintiff only if the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation," cf. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421. No such finding supported the fee award in this case, and the limitations apply with special force in an action, such as here, initiated by an uncounseled prisoner. Moreover, the fact that a prisoner's complaint, even when liberally construed, cannot survive a motion to dismiss does not, without more, entitle the defendant to attorney's fees.

Certiorari granted; affirmed in part, reversed in part, and remanded.

PER CURIAM.

Petitioner, an inmate of the Illinois State Penitentiary, asks us to review an order dismissing his civil rights action against the respondent corrections officers and directing him to pay counsel fees of $400 for services rendered by the Attorney General of Illinois in representing the respondents in that action.

After granting a motion to dismiss the complaint for failure to state a constitutional violation, the District Court ordered petitioner to show cause why fees of $400 should not be taxed against him under 42 U. S. C. § 1988. Because he did not respond to that order, the fee award was entered.[1] A motion to reconsider was later denied on the ground that petitioner's suit was "meritless."[2] The Court of Appeals disposed of the

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[1] The order entered by District Judge McMillen on October 18, 1978, reads as follows:

"On August 7, 1978, we ordered plaintiff to show cause within twenty (20) days thereof why defendants' attorneys' fees in the amount of $400 should not be taxed against plaintiff under 42 U. S. C. § 1988. Because plaintiff has not complied with or otherwise responded to that order, we hereby tax defendants' fees in the amount of $400 against him pursuant to 42 U. S. C. § 1988."

[2] On December 5, 1978, Judge McMillen entered the following order denying petitioner's motion for reconsideration:

"On October 18, 1978, we ordered that the defendants' attorneys fees in the amount of $400 should be taxed against the plaintiff pursuant to 42

novel question presented by petitioner by affirming the fee award in an unpublished order.[3] We now grant the motion for leave to proceed *in forma pauperis* and the petition for certiorari and reverse the judgment of the Court of Appeals.

I

On September 20, 1977, petitioner was charged with a violation of prison regulations and placed in segregation. At a disciplinary hearing two days later, petitioner admitted that

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U. S. C. § 1988. Plaintiff has filed a motion to reconsider said action. Plaintiff's motion to reconsider is denied and attorneys fees in the amount of $400 will be taxed against the plaintiff, as the suit was meritless."

[3] Rule 35 (c)(1) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit identifies those decisions warranting publication:

"A published opinion will be filed when the decision

"(i) establishes a new, or changes an existing, rule of law;

"(ii) involves an issue of continuing public interest;

"(iii) criticizes or questions existing law;

"(iv) constitutes a significant and nonduplicative contribution to legal literature

"(A) by a historical review of law,

"(B) by describing legislative history, or

"(C) by resolving or creating a conflict in the law;

"(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

"(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court."

When a decision does not satisfy these criteria, it is to be filed as an unpublished order. Circuit Rule 35 (c)(2). Unpublished orders may not be cited as precedent in any federal court within the Seventh Circuit. Circuit Rule 35 (b)(2)(iv).

Although petitioner's appeal was decided in an unpublished order purportedly having no precedential significance, three members of the Court of Appeals, Chief Judge Fairchild and Judges Swygert and Bauer, nonetheless voted to rehear the case en banc. Judge Swygert filed a written dissent from the order denying the petition for rehearing en banc.

he and two other inmates had consumed a homemade alcoholic beverage; his punishment was confinement to segregation for 10 days,[4] demotion to C-grade, and loss of 30 days' statutory good time.

Petitioner exhausted his administrative remedies and then filed a complaint under 42 U. S. C. § 1983 in the United States District Court for the Northern District of Illinois on the form used by prisoners who are not represented by counsel. The facts stated on the form raised two federal questions of arguable merit: (1) the decision to place petitioner in a segregation cell on September 20, 1977, was not preceded by a hearing and was not justified by any emergency or other necessity; (2) two of the officers who conducted the disciplinary hearing after petitioner had been in segregation for two days were biased against him.[5] Respondents, represented by the State Attorney General's Office, moved to dismiss the complaint, but filed no affidavits denying or explaining the facts alleged by petitioner. After allowing petitioner to file various amendments and additional papers, the District

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[4] It is unclear from the record whether this sentence included the two days petitioner spent in segregation prior to the disciplinary hearing, or whether he was sentenced to 10 days' segregation in addition to the time already served. There apparently is also some confusion with respect to the exact sentence imposed on petitioner at the hearing. The District Court's order dismissing the complaint indicates that petitioner was sentenced to 30 days in segregation. The Court of Appeals' order, on the other hand, states that he was sentenced to 10 days in segregation. The petition for writ of certiorari and respondents' brief in opposition filed in this Court are similarly inconsistent on this point. The record seems to indicate that petitioner was sentenced to 10 days in segregation. The uncertainty with respect to petitioner's posthearing segregation is not, however, material to our decision in this case.

[5] Petitioner also alleged that respondents violated their own procedural regulations, and that it was a denial of equal protection of the laws and cruel and unusual punishment to impose a more severe sentence on him than on the other two inmates involved in the incident, since he had confessed to drinking and they had not.

Court dismissed the complaint without taking any evidence. Thereafter the fee award was made.

In its order affirming the action of the District Court, the Court of Appeals correctly noted that the Due Process Clause of the Fourteenth Amendment affords a prisoner certain minimum procedural safeguards before disciplinary action may be taken against him.[6] Because the record did not reveal a violation of those safeguards at the hearing on September 22, the Court of Appeals concluded that the complaint had been properly dismissed. However, the Court of Appeals seems to have overlooked the fact, clearly stated in petitioner's brief on appeal, that the disciplinary hearing did not take place until two days after petitioner was placed in segregation on September 20. Nothing in the papers filed on behalf of the respondents purports to justify or explain the segregation of petitioner for two days in advance of the disciplinary hearing.

II

Petitioner's complaint, like most prisoner complaints filed in the Northern District of Illinois, was not prepared by counsel. It is settled law that the allegations of such a complaint, "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers . . . ." *Haines* v. *Kerner*, 404 U. S. 519, 520 (1972). See also *Maclin* v. *Paulson*, 627 F. 2d 83, 86 (CA7 1980); *French* v.

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[6] As the Court of Appeals noted:

"The Supreme Court has delineated the standard to be applied in determining whether a prisoner has been afforded his minimum due process rights. Wolff v. McDonnell, 418 U. S. 539 . . . (1974). The prisoner is entitled to (1) advance written notice of the charges against him or her; (2) an opportunity to call witnesses and present documentary evidence, provided that to do so will not jeopardize institutional safety or correctional goals, before a sufficiently impartial hearing board; (3) a written statement by the fact finder of 'the evidence relied upon and reasons for the disciplinary action taken.'"

Heyne, 547 F. 2d 994, 996 (CA7 1976). Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Haines, supra*, at 520–521.[7] And, of course, the allegations of the complaint are generally taken as true for purposes of a motion to dismiss. *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972).

Applying these principles to petitioner's amended complaint, we conclude that all but one of its allegations were properly dismissed for failure to state a claim. Petitioner's allegations of bias and procedural irregularities in the September 22 hearing, unequal treatment, and cruel and unusual punishment, even when liberally construed, were insufficient to require any further proceedings in the District Court. We therefore affirm the dismissal of these claims.

Petitioner's allegation that he had been confined unnecessarily to segregation is of a different character. It can be construed as a contention that his confinement to segregation violated due process because it took place without a prior hearing. It is clear from the facts alleged in the amended complaint that petitioner was confined in segregation for two days before a hearing was held. Indeed, petitioner expressly stated this claim in procedural due process terms in his response to the defendants' motion to dismiss the amended complaint.[8]

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[7] The Court reaffirmed the principles of *Haines* in *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976):

"As the Court unanimously held in *Haines* v. *Kerner*, 404 U. S. 519 (1972), a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears '"beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."' *Id.*, at 520–521, quoting *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957)."

[8] In a document entitled, "Response to: Motion to Dismiss or For Sum-

Segregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions. See *Hayes* v. *Walker*, 555 F. 2d 625, 633 (CA7), cert. denied, 434 U. S. 959 (1977). The amended complaint alleged that segregation was unnecessary in petitioner's case because his offense did not involve violence and he did not present a "clear and present danger." There is no suggestion in the record that immediate segregation was necessitated by emergency conditions. Defendants did make the unsworn assertion that petitioner was placed in segregation on "temporary investigative status," [9] but the significance of this designation is unclear and it does not, without more, dispose of petitioner's procedural due process claim. The District Court, in dismissing the amended complaint, merely concluded that temporary segre-

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mary Judgment/& Memorandum in Support of Motion to Dismiss or For Summary Judgment," petitioner alleged:

"*Placement in Segregation:* Plaintiff was placed in Segregation on September 20, 1977, with *no* hearing what-so-ever. No reasons provided him as to *why* it was necessary to place him in segregation. *No* Resident Information Report issued him, stating he was being placed in segregation, under *investigation* status." Response, at 2 (emphasis in original).

Petitioner thereafter asserted that "[c]lassification to segregation must comply with procedural due process." *Id.*, at 4, 7. Petitioner went on to assert that his placement in segregation on September 20 was "completely unnecessary, because plaintiff posed no immediate threat to the safety and security of the institution. . . ." *Id.*, at 8. Later in the response, petitioner discussed his due process claim in detail. *Id.*, at 15–16.

[9] In their Memorandum in Support of Motion to Dismiss or for Summary Judgment, respondents asserted:

"Plaintiff's placement in segregation cellhouse on September 20, 1977 on temporary investigative status pending hearing of the resident information reports on September 22, 1977 does not rise to the level of a constitutional deprivation. No disciplinary sanctions constituting a grievous loss were imposed prior to a disciplinary hearing. The transfer of a resident from one cell to another does not trigger due process protections. *Meachum* v. *Fano*, 427 U. S. 215 . . . (1976)."

gation pending investigation was not actionable.[10] The court cited an Illinois Department of Corrections Administrative Regulation which authorized segregation of prisoners pending investigation of disciplinary matters, where required "in the interest of institutional security and safety."[11] In the absence of any showing that concern for institutional security and safety was the basis for immediate segregation of petitioner without a prior hearing, this regulation does not justify dismissal of petitioner's suit for failure to state a claim.

Our discussion of this claim is not intended to express any view on its merits. We conclude merely that the amended complaint was adequate at least to require some response from the defendants, by way of affidavit or otherwise, to petitioner's claim that he was unjustifiably placed in segregation without a prior hearing. Although petitioner's pleadings are prolix and lacking in stylistic precision, this is not a case like *Estelle* v. *Gamble*, 429 U. S. 97 (1976), in which a *pro se* litigant's detailed recitation of the facts reveals on its face the insufficiency of the complaint. We cannot say with assurance that petitioner can prove no set of facts in support of his claim

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[10] The District Court's order dismissing petitioner's complaint stated:

"Plaintiff complains that his placement in segregation between the evening of September 20 and his hearing on September 22 was 'unnecessary' because no violence was involved in the incident. We find that his temporary placement in segregation pending the hearing, which was brought within the required 72 hour period, is not actionable. See A. R. 804 (G), effective December 1, 1976."

[11] This regulation, Administrative Regulation § 804 (II) (G), provides, in pertinent part:

"It is recognized that incidents occur which, in the interest of institutional security and safety, require that a resident be removed from the general population and placed in a holding unit pending the completion of an investigation. As the holding unit functions in the same manner as a segregation unit (except that single celling is not required in the holding unit), a resident must be provided with the same procedural safeguards and services as are required by this regulation relative to placements, conditions and services in a segregation unit."

entitling him to relief. *Haines* v. *Kerner*, 404 U. S., at 521. Accordingly, the Court of Appeals should have reversed the dismissal of this claim and remanded for further proceedings.[12]

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[12] The dissenting opinion rests on the alternative and somewhat inconsistent grounds that prehearing solitary confinement was (a) proper punishment for an offense that was already adequately proved, (b) necessary in order to forestall the development of a contrived defense, and (c) harmless because petitioner subsequently received a fair hearing. The record reveals that these grounds are not sufficient to justify the dismissal of petitioner's complaint.

On the basis of petitioner's admission that he had been drinking, plus unsworn allegations in the reports of the corrections officers, the dissent concludes that petitioner was intoxicated on September 20 and that he posed a threat to prison security and safety sufficiently serious to warrant immediate segregation.

There is little doubt that some intoxicated prisoners may pose a threat to prison security justifying segregation without a hearing. The problem in this case is that the record does not establish, and the District Court did not find, that petitioner was in fact intoxicated or that his condition presented a threat to institutional security. Indeed, at no point in this litigation have the respondents asserted, by affidavit or otherwise, that petitioner was placed in segregation on September 20 because of such security concerns.

The dissent also speculates that inmates suspected of violations of prison regulations, if allowed to remain in the general prison population pending disciplinary proceedings, will fabricate alibi defenses and intimidate potential witnesses. *Post*, at 22. This danger would apparently justify automatic investigative segregation of all inmate suspects. Ironically, however, even the Administrative Regulation cited by the District Court, see n. 11, *supra*, does not purport to justify such blanket segregation. Moreover, automatic investigative segregation is particularly inappropriate for an inmate, like petitioner, who has already admitted guilt; fabrication of alibis or intimidation of witnesses seems unlikely in such a case. While investigative concerns might, in particular cases, justify prehearing segregation, nothing in the present record suggests that these concerns were at work in this case.

Either the institutional security or the investigative justification postulated by the dissent might well be dispositive had the District Court made appropriate findings. The respondents did not, however, present these justifications to the District Court and the District Court accord-

III

The award of attorney's fees entered against petitioner must be vacated.

In *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), we held that the defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff only if the District Court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.*, at 421. Although arguably a different standard might be applied in a civil rights action under 42 U. S. C. § 1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. As we stated in *Christiansburg:*

> "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally pre-

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ingly made no such findings. The record is entirely consistent with the possibility that an inmate who admittedly had been drinking posed no threat at all to prison security and had no intent to deny the facts, but did want an opportunity to establish mitigating circumstances before being placed in solitary confinement. The dissent's emphasis upon petitioner's admission confuses the distinction, previously recognized by this Court, between the question of guilt and the question of appropriate punishment. Cf. *Morrissey* v. *Brewer*, 408 U. S. 471, 483–484 (1972).

Finally, even if the subsequent hearing accorded petitioner minimized or eliminated any compensable harm resulting from the initial denial of procedural safeguards, his constitutional claim is nonetheless actionable. *Carey* v. *Piphus*, 435 U. S. 247, 266–267 (1978). "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.*, at 266 (footnote omitted).

> vail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U. S., at 422.

No such finding supported the fee award in this case.

These limitations apply with special force in actions initiated by uncounseled prisoners. Faithful adherence to the principles of *Haines* v. *Kerner* dictates that attorney's fees should rarely be awarded against such plaintiffs. The fact that a prisoner's complaint, even when liberally construed, cannot survive a motion to dismiss does not, without more, entitle the defendant to attorney's fees. An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims. As the Court noted in *Christiansburg*, even if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit. 434 U. S., at 422.

Despite the lower court's conclusion to the contrary, the allegations of petitioner's amended complaint are definitely not meritless in the *Christiansburg* sense. Even those allegations that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District Court and the Court of Appeals.[13] Allegations that,

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[13] As Judge Swygert noted in his dissent from the order denying rehearing en banc, see n. 3, *supra*, the District Court dismissed petitioner's claims only after detailed consideration resulting in a seven-page opinion. According to Judge Swygert:

"It is quite evident from the detailed treatment given by the district court to the issues raised by plaintiff's complaint that the suit was not groundless or meritless. That fact is corroborated by this court's treatment of the same issues on appeal."

upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, "groundless" or "without foundation" as required by *Christiansburg*.

The judgment of the Court of Appeals is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

JUSTICE STEWART would affirm the judgment of the Court of Appeals insofar as it affirmed the District Court's dismissal of the petitioner's complaint. He substantially agrees, however, with what is said in Part III of the Court's *per curiam* opinion, and for those reasons would reverse the judgment insofar as it affirmed the award of attorney's fees entered against the petitioner.

JUSTICE WHITE, concurring in part and concurring in the result.

I agree with the result reached in Part II of the *per curiam* opinion. Under *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), a prior hearing was required for the particular disciplinary action involved here—segregation and loss of good time. But as *Wolff* makes clear, Fourteenth Amendment procedural protections were triggered only because under state law—here prison regulations—segregation and good-time reductions could be imposed only for serious disciplinary lapses and only after a prior hearing.[1] Under these regulations, segregation

[1] Illinois Department of Corrections Administrative Regulations in effect at the time of this incident provided that a Program Team could act on charges of minor rule violations, but that an Adjustment Committee hearing was required on all other charges of rule violations, "including those which may result programmatic removal from the population, demotion in grade, or loss of good time." Administrative Regulation § 804 (II)(A)(4). The regulations also provided that a resident must be in-

prior to a hearing could occur only for reasons of prison security and safety.[2] I agree that there have been no findings that warranted dispensing with the prior hearing.

It is well to point out, however, that although petitioner sought compensatory and punitive damages, as well as declaratory relief, he had a full hearing within 48 hours of his confinement, his guilt was properly established (indeed, he admitted his conduct as he had before), and the discipline imposed on him was found to be justified. Even if petitioner is successful in proving a due process deprivation, his damages would be limited to those flowing from postponement of a hearing for two days. Under *Carey* v. *Piphus*, 435 U. S. 247 (1978), it is likely that only nominal damages would be awardable.

I am in accord with Part III of the Court's opinion.

JUSTICE REHNQUIST, dissenting.

In its effort to distill some vaguely tenable claim from petitioner's complaint, the Court ignores crucial admissions in

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formed, *inter alia*, that "if found guilty of a serious rule violation [by the Adjustment Committee] and found to be a danger to the institutional community, he may be placed in segregation and/or deprived of his current grade and statutory good time credit." § 804 (II) (B) (4).

[2] Illinois Department of Corrections Administrative Regulations authorized confinement of a resident in a holding unit pending the completion of an investigation "in the interest of institutional security and safety." See § 804 (II) (G) (1), quoted in full in the majority opinion, *ante*, at 12, n. 11. The regulations also authorized confinement of a resident in a holding unit in two other situations, again for security reasons. Section 804 (II) (E) (1) provided:

"Whenever it is necessary to remove a resident from the general population on an emergency basis due to serious aggressive behavior and/or for safekeeping, the shift captain and/or unit manager must authorize the placement of a resident in a holding unit until the next meeting of the Adjustment Committee, which in no case may exceed 72 hours."

Section 804 (II) (F) (1) provided:

"Whenever it is deemed necessary by the Chief Administrative Officer to

the complaint itself which fatally undermine any claim of constitutional deprivation. As I read the Court opinion, it holds that the District Court erred in dismissing petitioner's complaint solely because the complaint can be construed to allege that petitioner was placed in segregation without a prior hearing, although he was given an adequate hearing before a review board 40 hours later. The Court recognizes that petitioner admitted before the review board that he violated prison regulations by consuming homemade alcohol, *ante*, at 7–8, but fails to recognize that he had also admitted his guilt *at the time of the incident*. In his amended complaint petitioner alleged:

> "[I] was placed in segregation unnecessarily on September 20, 1977, because there was no violence involved, and I was not a 'clear and present' danger. Additionally, I had admitted to Captain C. D. Tuttle that I had been drinking." Amended Complaint 13.[1]

The complaint also reveals that petitioner has "a problem with alcohol." *Id.*, at 14.[2] In light of these admissions it is difficult to see what purpose the hearing which the Court rules may have been constitutionally required would have served. The hearing would not be held to determine if petitioner violated prison regulations; he admitted that he had when apprehended. Nor would the hearing be held to determine appropriate punishment. That hearing, before the re-

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transfer a resident to another correctional facility for security reasons, the resident may be confined in a holding unit for not more than 72 hours. See ARs 819 and 822 on transfers."

[1] The resident information report filled out by Captain Tuttle and served on petitioner the night the incident occurred confirms that petitioner admitted to drinking at that time.

[2] The nature of this problem was elaborated in a grievance filed by petitioner two days after the review board hearing. There he stated he has "had a problem with [a]lcohol ever since I was fifteen years old, and nowhere in my past record will you find any sort of arrest that didn't involve [a]lcohol or drugs."

view board, was held 40 hours later, and the Court concedes that no matter how liberally petitioner's complaint is construed it does not state any claim concerning the conduct of that hearing or the punishment. *Ante*, at 10. The sole purpose the hearing could have served would be to determine if petitioner should have been removed from the general prison population for the short period between the occurrence of the incident at 7:30 the night of September 20 and the review board hearing held before noon on September 22.

In light of the facts admitted by petitioner, however, it is clear that he cannot state a claim against the prison officials for not holding such a hearing. The reports of the conduct of which petitioner admitted being guilty described his condition as "tipsy, speech slurred" and stated that petitioner "had all the appearance of being drunk" and "appeared to be intoxicated." In his grievance filed on September 24 petitioner again admitted that he had gotten "drunk" the night of the 20th.[3]

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[3] The Court, *ante*, at 13, n. 12, states that our conclusion that petitioner was intoxicated rests on reports by the officers and petitioner's admission that he had been drinking. This statement overlooks the September 24 grievance filed by petitioner, wherein he reviewed what he considered the highlights of his prison career and asked "why, with all the things I had going for myself, and being so close to appearing before the Parole Board, *did I get drunk* and louse up the good record I had?" (emphasis supplied). It also overlooks that petitioner admitted being guilty of the conduct set forth in the reports which described his condition as noted in the text. Petitioner did not argue before the review board, as one of his drinking companions did, that although he had been drinking he was not intoxicated. But even more importantly, the Court's effort to distinguish between an inmate who has been drinking in violation of prison regulations and an intoxicated inmate, or an intoxicated inmate who poses a threat to prison security and safety and one who does not, places an intolerable burden on prison officials, who apparently must, at the risk of money damages, decide precisely when a drinking inmate is drunk or even how a particular inmate will react when drunk. This is completely at odds with the established rule that prison officials are accorded great deference in the discharge of their central responsibility for prison security and discipline, see *infra*, at 20.

Intoxicated inmates surely pose a serious threat to prison security and safety, and the placing of petitioner in temporary investigative status was authorized by a prison regulation providing for such action "in the interest of institutional security and safety." This Court has on several occasions stressed that " 'central to all other corrections goals is the institutional consideration of internal security within corrections facilities themselves.' " *Bell* v. *Wolfish*, 441 U. S. 520, 546–547 (1979) (quoting *Pell* v. *Procunier*, 417 U. S. 817, 823 (1974)). See *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 129 (1977); *Procunier* v. *Martinez*, 416 U. S. 396, 412 (1974). "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . . . ." *Bell* v. *Wolfish*, *supra*, at 547. This Court has also repeatedly recognized that the judiciary, "ill-equipped" to deal with "complex and difficult" problems of running a prison, must accord the decisions of prison officials great deference. See, *e. g.*, *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, at 126; *Procunier* v. *Martinez*, *supra*, at 405. This rule applies with its greatest force when prison officials act to preserve the central goal of institutional discipline. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, *supra*, at 547. Against this well-established background, and with petitioner's admitted violation of prison regulations by consuming homemade alcohol, it is clear that the prison officials acted within their discretion in removing petitioner from the general prison population. Even the Court of Appeals authority relied upon by the Court recognized that claims such as the present one must be based on allegations of "bad faith" or "mere pretext." *Hayes* v. *Walker*, 555 F. 2d 625, 633 (CA7 1977) (quoting *La Batt* v. *Twomey*, 513 F. 2d 641, 647 (CA7 1975)). Because petitioner has admitted to being intoxicated, however, it is clear that he cannot claim

the prison officials acted out of bad faith or on mere pretext. Their decision to remove him from the general prison population was "rationally related to the reasonable, indeed to the central, objectives of prison administration," *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 129.

Indeed, it is difficult to envision exactly how an intoxicated inmate would participate in any meaningful way in a hearing held immediately after the drinking incident. A strong argument could certainly be advanced that it would have been a violation of petitioner's rights to hold a hearing when he was, as he admitted, drunk.

This case is thus like *Codd* v. *Velger,* 429 U. S. 624 (1977), where we held that no constitutional violation occurred when an untenured employee was discharged without a hearing. No hearing was required to permit the employee to clear his name, since he did not dispute the truth of the allegedly stigmatizing reason for the discharge. Here the case is even stronger, since petitioner not only does not contend he was innocent of any violation but also admitted his guilt at the time of the incident. In *Codd* no hearing was required on whether the discharge was justified in light of the employee's conduct because the employee had no property interest in continued employment. So, too, here no hearing was required on whether removal from the general prison population pending convening of the review board was justified, since this decision is within the discretion of prison officials and, in view of petitioner's admissions, no abuse of discretion can be shown.[4]

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[4] The Court's citation of *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), and *Carey* v. *Piphus,* 435 U. S. 247 (1978), begs the question whether a hearing prior to the review board hearing was required in this case. In both of these cases the Court held that a hearing was generally required *prior* to the deprivations involved, so that even if the deprivations were later found to have been justified, a constitutional violation occurred if no prior hearing had been held. Here, however, the Court recognizes that "appropriate findings" by the District Court concerning petitioner's intoxication or investigative concerns would be dispositive, presumably

Even if petitioner had not represented a threat to prison security himself, his removal from the general prison population for a brief period [5] was fully justified in order to protect the integrity of the later hearing before the review board. Permitting inmates to return to the general prison population following a serious breach of prison discipline or violation of prison rules poses difficulties in terms of alibi construction and witness intimidation. The problems were certainly present in this case, where one of three inmates involved in a single incident admitted the charges but the other two denied them. The argument that such investigative justifications cannot outweigh the burden imposed on an innocent or possibly innocent inmate, whatever its merit in other cases, is of course not applicable in this case where petitioner has admitted and continues to admit his guilt.

Nothing in the foregoing detracts from the rule of *Haines* v. *Kerner*, 404 U. S. 519 (1972), concerning the liberality with which *pro se* inmate complaints are to be read, since the complaint itself contains the admission of guilt which undermines any colorable claim. I would also note that petitioner filed his original and amended complaints on forms designed to make it easier for *pro se* inmates to articulate their claims. Such forms should make the problem of *Haines* v. *Kerner* recur less frequently by isolating the relevant information for the district court judge. The Court notes that the District Court gave petitioner's complaint "careful consideration," and Judge Swygert below argued that "it is quite evi-

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because they would indicate no hearing was required. Thus so far as is discernible the Court's reasoning is not the lack of hearing before confinement, but the fact of possible *wrongful* confinement without a prior hearing. Findings are not necessary when petitioner's own admissions conclusively undermine any possible claim that the prison officials acted in bad faith or on mere pretext.

[5] Prison regulations permit segregation on temporary investigative status for no more than 72 hours; petitioner had his review board hearing within 40 hours of the incident.

dent from the detailed treatment given by the [D]istrict [C]ourt to the issues . . . that the suit was not groundless or meritless." It is odd, however, to reverse a District Court for spending considerable time and effort before concluding that a complaint was meritless. The fact that the District Court carefully examined petitioner's complaint for any possible claim before dismissing it is hardly evidence that a colorable claim must exist. Quite the contrary, it is a strong indication that no claim could be found no matter how deeply the District Court probed.

The award of attorney's fees was entirely proper in this case. The District Court expressly found that petitioner's suit was meritless in response to respondents' motion, which was based on *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), and cited that case extensively. It is clear, therefore, that the District Court was using "meritless" as that term was understood in *Christiansburg*, *supra*, at 421 ("the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case").

The decision whether to award attorney's fees under 42 U. S. C. § 1988 is committed to the discretion of the district courts, who are intimately familiar with the course of the litigation. Like the Court of Appeals for the Seventh Circuit, I cannot say that the District Court abused its discretion in awarding attorney's fees in this case. In light of petitioner's own admissions it was clear from the outset that he could state no cognizable claim. This is not a case, such as was suggested in *Christiansburg*, *supra*, at 422, where the claim appeared meritorious at the outset and only later was refuted by facts which emerged on discovery or at trial. The decisive facts were stated in the complaint and they were not merely "questionable" or "unfavorable," as the Court suggests, *ante*, at 15; they were dispositive.

DENNIS *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79–1186. Argued October 8, 1980—Decided November 17, 1980

After a Texas state court's injunction against respondents' production of minerals from certain oil leases was dissolved by an appellate court as having been illegally issued, respondents filed suit in Federal District Court alleging a cause of action for damages under 42 U. S. C. § 1983 against the judge who issued the injunction, the corporation that had obtained the injunction, its owner, and the sureties on the injunction bond (one of whom is the petitioner). Respondents claimed that the injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants, thus causing a deprivation of property without due process of law. The District Court dismissed the action, holding that the judge was immune from liability in a § 1983 suit because the injunction was a judicial act within the jurisdiction of the state court, and that with the dismissal of the judge the remaining defendants could not be said to have conspired "under color" of state law within the meaning of § 1983. The Court of Appeals agreed that the judge was immune from suit, but ultimately reversed as to the dismissal of the claims against the other defendants.

Held: The action against the private parties accused of conspiring with the judge is not subject to dismissal. Private persons, jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of § 1983 actions. And the judge's immunity from damages liability for an official act that was allegedly the product of a corrupt conspiracy involving bribery of the judge does not change the character of his action or that of his co-conspirators. Historically at common law, judicial immunity does not insulate from damages liability those private persons who corruptly conspire with a judge. Nor has the doctrine of judicial immunity been considered historically as excusing a judge from responding as a witness when his co-conspirators are sued, even though a charge of conspiracy and judicial corruption will be aired and decided. *Gravel* v. *United States*, 408 U. S. 606, distinguished. The potential harm to the public from denying immunity to co-conspirators if the factfinder mistakenly upholds a charge of a corrupt conspiracy is outweighed by the benefits of providing a remedy

against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons. Pp. 27–32.

604 F. 2d 976, affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Finley L. Edmonds argued the cause and filed a brief for petitioner.

Garland F. Smith argued the cause and filed a brief for respondents.*

JUSTICE WHITE delivered the opinion of the Court.

In January 1973, a judge of the 229th District Court of Duval County, Tex., enjoined the production of minerals from certain oil leases owned by respondents. In June 1975, the injunction was dissolved by an appellate court as having been illegally issued. Respondents then filed a complaint in the United States District Court purporting to state a cause of action for damages under 42 U. S. C. § 1983.[1] Defendants were the Duval County Ranch Co., Inc., which had obtained the injunction, the sole owner of the corporation, the judge who entered the injunction, and the two individual

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*Briefs of *amici curiae* urging reversal were filed by *Jim Smith*, Attorney General, and *Gerald B. Curington*, Assistant Attorney General, for the State of Florida; and by *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, Executive Assistant Attorney General, and *Laura S. Martin* and *Lonny F. Zwiener*, Assistant Attorneys General, for the State of Texas.

Suzanne M. Lynn filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

[1] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

sureties on the injunction bond, one of whom is now petitioner in this Court. Essentially, the claim was that the injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants, thus causing a deprivation of property, *i. e.*, two years of oil production, without due process of law.

All defendants moved to dismiss, the judge asserting judicial immunity and the other defendants urging dismissal for failure to allege action "under color" of state law, a necessary component of a § 1983 cause of action. The District Court concluded that because the injunction was a judicial act within the jurisdiction of the state court, the judge was immune from liability in a § 1983 suit, whether or not the injunction had issued as the result of a corrupt conspiracy. Relying on *Haldane* v. *Chagnon*, 345 F. 2d 601 (CA9 1965), the District Court also ruled that with the dismissal of the judge the remaining defendants could not be said to have conspired under color of state law within the meaning of § 1983. The action against them was accordingly dismissed "for failure to state a claim upon which relief can be granted."

In a *per curiam* opinion, a panel of the Court of Appeals for the Fifth Circuit affirmed, agreeing that the judge was immune from suit and that because "the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid § 1983 suit can be stated," *Sparks* v. *Duval County Ranch Co.*, 588 F. 2d 124, 126 (1979), existing authorities in the Circuit required dismissal of the claims against these defendants as well.[2] The case was reconsidered en banc, prior Circuit authority was overruled and the District Court judgment was reversed insofar as it had dismissed claims against the defendants other than the judge. *Sparks* v. *Duval County Ranch Co.*, 604 F. 2d

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[2] *Slavin* v. *Curry*, 574 F. 2d 1256 (1978); *Perez* v. *Borchers*, 567 F. 2d 285 (1978); *Humble* v. *Foreman*, 563 F. 2d 780 (1977); *Hill* v. *McClellan*, 490 F. 2d 859 (1974); *Guedry* v. *Ford*, 431 F. 2d 660 (1970).

976 (1979). The court ruled that there was no good reason in law, logic, or policy for conferring immunity on private persons who persuaded the immune judge to exercise his jurisdiction corruptly. Because the judgment below was inconsistent with the rulings of other Courts of Appeals [3] and involves an important issue, we granted the petition for certiorari. 445 U. S. 942. We now affirm.

Based on the doctrine expressed in *Bradley* v. *Fisher*, 13 Wall. 335 (1872), this Court has consistently adhered to the rule that "judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Stump* v. *Sparkman*, 435 U. S. 349 (1978)." *Supreme Court of Virginia* v. *Consumers Union*, 446 U. S. 719, 734–735 (1980). The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on immunity grounds. It does not follow, however, that the action against the private parties accused of conspiring with the judge must also be dismissed.

As the Court of Appeals correctly understood our cases to hold, to act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged

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[3] *Kurz* v. *Michigan*, 548 F. 2d 172 (CA6 1977); *Hazo* v. *Geltz*, 537 F. 2d 747 (CA3 1976); *Hansen* v. *Ahlgrimm*, 520 F. 2d 768 (CA7 1975); *Sykes* v. *California*, 497 F. 2d 197 (CA9 1974). See also *Haldane* v. *Chagnon*, 345 F. 2d 601, 604–605 (CA9 1965); but see *Briley* v. *California*, 564 F. 2d 849, 858, n. 10 (CA9 1977). The Court of Appeals for the First Circuit has for some time held the present views of the Fifth Circuit. *Slotnick* v. *Staviskey*, 560 F. 2d 31 (1977); *Kermit Construction Corp.* v. *Banco Credito y Ahorro Ponceno*, 547 F. 2d 1 (1976). The Court of Appeals for the Eighth Circuit has recently agreed. *White* v. *Bloom*, 621 F. 2d 276 (1980).

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with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970); *United States* v. *Price*, 383 U. S. 787, 794 (1966).[4] Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators.[5] Indeed, his

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[4] In this respect, our holding in *Adickes* v. *S. H. Kress & Co.* was as follows:

"The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; *Monroe* v. *Pape*, 365 U. S. 167 (1961); see *United States* v. *Classic*, 313 U. S. 299, 326 (1941); *Screws* v. *United States*, 325 U. S. 91, 107–111 (1945); *Williams* v. *United States*, 341 U. S. 97, 99–100 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,' *United States* v. *Price*, 383 U. S. 787, 794 (1966)." 398 U. S., at 152. (Footnote omitted.)

[5] Title 18 U. S. C. § 242, the criminal analog of § 1983, also contains a color-of-state-law requirement and we have interpreted the color-of-state-law requirement in these sections coextensively. *Adickes* v. *S. H. Kress & Co.*, *supra*, at 152, n. 7. A state judge can be found criminally liable under § 242 although that judge may be immune from damages under § 1983. See *Imbler* v. *Pachtman*, 424 U. S. 409, 429 (1976); *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). In either case, the judge has acted under color of state law.

immunity is dependent on the challenged conduct being an official judicial act within his statutory jurisdiction, broadly construed. *Stump* v. *Sparkman*, 435 U. S. 349, 356 (1978); *Bradley* v. *Fisher*, *supra*, at 352, 357. Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases. The complaint in this case was not defective for failure to allege that the private defendants were acting under color of state law, and the Court of Appeals was correct in rejecting its prior case authority to the contrary.

Petitioner nevertheless insists that unless he is held to have an immunity derived from that of the judge, the latter's official immunity will be seriously eroded. We are unpersuaded. The immunities of state officials that we have recognized for purposes of § 1983 are the equivalents of those that were recognized at common law, *Owen* v. *City of Independence*, 445 U. S. 622, 637–638 (1980); *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976); *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967), and the burden is on the official claiming immunity to demonstrate his entitlement. Cf. *Butz* v. *Economou*, 438 U. S. 478, 506 (1978). Thus, in *Owen* v. *City of Independence*, *supra*, a municipality's claim that it could assert the immunity of its officers and agents in a § 1983 damages action was rejected since there was no basis for such a right at common law. Here, petitioner has pointed to nothing indicating that, historically, judicial immunity insulated from damages liability those private persons who corruptly conspire with the judge.[6]

In *Gravel* v. *United States*, 408 U. S. 606 (1972), we recognized that the Speech or Debate Clause conferred im-

[6] Insofar as the immunity issue is concerned, it is interesting to note that petitioner observes that he would not be immune in the Texas courts, even if the judge is. Brief for Petitioner 28.

munity upon a Senator's aide as well as the Senator, but only in those situations where the conduct of the aide would be a protected legislative act if performed by the Senator himself. *Id.*, at 618. Here, there could be no claim that petitioner or any of the other private parties was actually performing a judicial act or was in any sense an official aide of the judge. Not surprisingly, petitioner does not argue that judges must conspire with private parties in order that judicial duties may be properly accomplished.

It is urged that if petitioner and other private co-conspirators of the judge are to be subject to § 1983 damages actions and if a case such as this is to go to trial, the charge of conspiracy and judicial corruption will necessarily be aired and decided, the consequence being that the judge, though not a party and immune from liability, will be heavily involved, very likely as a witness forced to testify about and defend his judicial conduct. It is true that, based on the Speech or Debate Clause, we have held that Members of Congress need not respond to questions about their legislative acts, *Gravel* v. *United States*, *supra*, at 616–617; and, in general, the scope of state legislative immunity for purposes of § 1983 has been patterned after immunity under the Speech or Debate Clause. *Supreme Court of Virginia* v. *Consumers Union*, 446 U. S., at 732–734. But there is no similar constitutionally based privilege immunizing judges from being required to testify about their judicial conduct in third-party litigation. Nor has any demonstration been made that historically the doctrine of judicial immunity not only protected the judge from liability but also excused him from responding as a witness when his co-conspirators are sued. Even if the judge were excused from testifying, it would not follow that actions against private parties must be dismissed.

Of course, testifying takes time and energy that otherwise might be devoted to judicial duties; and, if cases such as this

survive initial challenge and go to trial, the judge's integrity and that of the judicial process may be at stake in such cases. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability. Judges are immune from § 1983 damages actions, but they are subject to criminal prosecutions as are other citizens. *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). Neither are we aware of any rule generally exempting a judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding.[7] Cf. *United States* v. *Nixon*, 418 U. S. 683, 705–707 (1974).

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. *Pierson* v. *Ray*, *supra*, at 554; *Bradley* v. *Fisher*, 13 Wall., at 349, 350, n. ‡. In terms of undermining a judge's independence and his judicial performance, the concern that his conduct will be examined in a collateral proceeding against those with whom he allegedly conspired, a proceeding in which he cannot be held liable for damages and which he need not defend, is not of the same order of magnitude as the prospects of being a defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt conspiracy with others. These concerns are not insubstantial, either for the judge or for the public, but we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators

[7] Whether the federal courts should be especially alert to avoid undue interference with the state judicial system flowing from demands upon state judges to appear as witnesses need not be addressed at this time.

is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.

The judgment of the Court of Appeals is

Affirmed.

ALLIED CHEMICAL CORP. ET AL. *v.* DAIFLON, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 79-1895. Decided November 17, 1980

Held: Where the District Court, because of error in certain of its evidentiary rulings in respondent's private antitrust action, had entered a nonappealable interlocutory order granting a new trial after the jury had returned a verdict for respondent, the Court of Appeals erred in issuing a writ of mandamus directing the trial court to restore the verdict as to liability but permitting a new trial on damages. The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. The party seeking issuance of the writ must have no other adequate means to obtain the relief he desires, and thus a trial court's ordering of a new trial, which is reviewable on direct appeal after a final judgment has been entered, rarely, if ever, will justify the issuance of the writ. To overturn a new-trial order by way of mandamus undermines the policy against piecemeal appellate review.

Certiorari granted; 612 F. 2d 1249, reversed.

PER CURIAM.

Respondent, Daiflon, Inc., is a small importer of refrigerant gas that brought an antitrust suit against all domestic manufacturers of the gas. Petitioner E. I. du Pont de Nemours & Co. was accused of monopolizing the industry in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. All petitioners were accused of conspiring to drive respondent out of business in violation of § 1 of the Sherman Act, 15 U. S. C. § 1.

After a 4-week trial, the jury returned a verdict for the respondent and awarded $2.5 million in damages. In a subsequent oral order, the trial court denied petitioners' motion for a judgment notwithstanding the verdict, but granted a motion for new trial. The trial court acknowledged in its oral order that it had erred during trial in certain of its evidentiary rulings and that the evidence did not support the amount of the jury award.

Respondent then filed a petition for a writ of mandamus with the Court of Appeals for the Tenth Circuit requesting that it instruct the trial court to reinstate the jury verdict. The Court of Appeals, without a transcript of the trial proceedings before it,[1] issued a writ of mandamus directing the trial court to restore the jury verdict as to liability but permitting the trial court to proceed with a new trial on damages. *Daiflon, Inc.* v. *Bohanon*, 612 F. 2d 1249. Petitioners seek review of this action of the Court of Appeals by their petition for certiorari with this Court.

An order granting a new trial is interlocutory in nature and therefore not immediately appealable. The question presented by this petition is therefore whether a litigant may obtain a review of an order concededly not appealable by way of mandamus. If such review were permissible, then the additional question would be presented as to whether the facts in this particular case warrant the issuance of the writ.

It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will* v. *United States*, 389 U. S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382–385 (1953); *Ex parte Fahey*, 332 U. S. 258, 259 (1947). On direct appeal from a *final* decision, a court of appeals has broad authority to "modify, vacate, set aside or reverse" an order of a district court, and it may direct such further action on remand "as may be just under the circumstances." 28 U. S. C. § 2106. By contrast, under the All Writs Act, 28 U. S. C. § 1651 (a), courts of appeals may issue a writ of mandamus only when "necessary or appropriate in aid of their respective jurisdic-

[1] The Court of Appeals did request that each party prepare a summary of the evidence presented in the trial court. The petitioners objected to this procedure which substituted a summary prepared by each party in lieu of the trial transcript. The court acknowledged in its opinion that the summary eventually filed by the petitioners only summarized the testimony of one witness and that the court was unaware of the identity of, or the testimony given by, the petitioners' other witness.

tions." Although a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances "would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will* v. *United States, supra,* at 98, n. 6.

This Court has recognized that the writ of mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will* v. *United States, supra,* at 95, quoting *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26 (1943). Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. *Will* v. *United States, supra,* at 95.

The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. See *Kerr* v. *United States District Court,* 426 U. S. 394, 402–403 (1976). Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would "run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." *Id.,* at 403. In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, *ibid.; Roche* v. *Evaporated Milk Assn., supra,* at 26, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co.* v. *Holland, supra,* at 384, quoting *United States* v.

Duell, 172 U. S. 576, 582 (1899). In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well, *hardly* ever!"

A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant "has no other adequate means to seek the relief he desires." The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." *Will* v. *Calvert Fire Ins. Co.*, 437 U. S. 655, 666 (1978) (plurality opinion).

To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review. Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review.[2] Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.[3]

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[2] It is worth noting that this case does not present the first instance in which the Court of Appeals felt it appropriate to overturn a new-trial order by the use of a common-law writ. In *Kanatser* v. *Chrysler Corp.*, 199 F. 2d 610 (CA10 1952), the court reached the same result by granting a writ of certiorari.

[3] Even if it be appropriate in certain circumstances to use mandamus to review a discretionary order by a trial court, the new-trial order entered in this case would not appear to be a likely candidate. A trial judge is not required . enter supporting findings of facts and conclusions of law when granting a new-trial motion. See Fed. Rule

The petition for a writ of certiorari is therefore granted, and the order of the Court of Appeals granting the writ of mandamus is

Reversed.

JUSTICE STEWART and JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE BLACKMUN, with whom JUSTICE WHITE joins, dissenting.

I have no quarrel with the general principles enunciated by the Court in its *per curiam* opinion. Of course, only exceptional circumstances justify the extraordinary remedy of mandamus. I sense, however, from the rather voluminous material that is before us (as contrasted with the average petition for certiorari), and from the Court of Appeals' careful review of the law and the decided cases concerning the use of the mandamus power, that this is an unusual case and that there well may be more here than appears at first glance. I therefore would not decide, peremptorily and summarily, what circumstances, if any, justify a federal appellate court's issuance of a writ of mandamus to overturn a trial court's order granting a new trial.* Instead, I would grant the

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Civ. Proc. 52 (a). It cannot be contended with any certainty that the trial court in this case, when entering its oral order granting a new trial, intended to set forth each and every reason for its order. The trial court did note, however, that it had made errors in the admission of certain documentary evidence and that it felt the petitioners had not received a fair trial. Given that the Court of Appeals did not have a complete transcript of the proceedings before it, see n. 1, *supra*, and that there could be other unarticulated bases for the new-trial order, it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion in entering the new-trial order.

*To the extent that the Court's decision in this case is based upon the inadequacy of the record before the Court of Appeals, the proper remedy is to remand for further proceedings based upon a complete record.

petition for certiorari and give the case plenary consideration so that we may examine carefully the factors and considerations that prompted the Court of Appeals to issue the writ. I feel that the case deserves at least that much.

STONE ET AL. *v.* GRAHAM, SUPERINTENDENT OF PUBLIC INSTRUCTION OF KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 80-321. Decided November 17, 1980

Held: A Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom in the State has no secular legislative purpose, and therefore is unconstitutional as violating the Establishment Clause of the First Amendment. While the state legislature required the notation in small print at the bottom of each display that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. The pre-eminent purpose of posting the Ten Commandments, which do not confine themselves to arguably secular matters, is plainly religious in nature, and the posting serves no constitutional educational function. Cf. *Abington School District* v. *Schempp*, 374 U. S. 203. That the posted copies are financed by voluntary private contributions is immaterial, for the mere posting under the auspices of the legislature provides the official support of the state government that the Establishment Clause prohibits. Nor is it significant that the Ten Commandments are merely posted rather than read aloud, for it is no defense to urge that the religious practices may be relatively minor encroachments on the First Amendment

Certiorari granted; 599 S. W. 2d 157, reversed.

PER CURIAM.

A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State.[1] Peti-

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[1] The statute provides in its entirety:

"(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Com-

tioners, claiming that this statute violates the Establishment and Free Exercise Clauses of the First Amendment,[2] sought an injunction against its enforcement. The state trial court upheld the statute, finding that its "avowed purpose" was "secular and not religious," and that the statute would "neither advance nor inhibit any religion or religious group" nor involve the State excessively in religious matters. App. to Pet. for Cert. 38–39. The Supreme Court of the Commonwealth of Kentucky affirmed by an equally divided court. 599 S. W. 2d 157 (1980). We reverse.

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971) (citations omitted).

If a statute violates any of these three principles, it must be

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mandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

"(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'

"(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act." 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980).

[2] The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This prohibition is applicable to the States through the Fourteenth Amendment. *Abington School District* v. *Schempp*, 374 U. S. 203, 215–216 (1963).

struck down under the Establishment Clause. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980).

The trial court found the "avowed" purpose of the statute to be secular, even as it labeled the statutory declaration "self-serving." App. to Pet. for Cert. 37. Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. In *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Id.*, at 223.

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths,[3] and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder,

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[3] As this Court commented in *Abington School District* v. *Schempp*, *supra*, at 224: "Surely the place of the Bible as an instrument of religion cannot be gainsaid . . . ."

adultery, stealing, false witness, and covetousness. See Exodus 20: 12–17; Deuteronomy 5: 16–21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1–11; Deuteronomy 5: 6–15.

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District* v. *Schempp, supra,* at 225. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State . . . Government" that the Establishment Clause prohibits. 374 U. S., at 222; see *Engel* v. *Vitale,* 370 U. S. 421, 431 (1962).[4] Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel,* for "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Abington School District* v. *Schempp, supra,* at 225. We conclude that Ky. Rev.

[4] Moreover, while the actual copies of the Ten Commandments were purchased through private contributions, the State nevertheless expended public money in administering the statute. For example, the statute requires that the state treasurer serve as a collecting agent for the contributions. Ky. Rev. Stat. § 158.178 (3) (1980).

Stat. § 158.178 (1980) violates the first part of the *Lemon* v. *Kurtzman* test, and thus the Establishment Clause of the Constitution.[5]

The petition for a writ of certiorari is granted, and the judgment below is reversed.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BLACKMUN dissent. They would grant certiorari and give this case plenary consideration.

JUSTICE STEWART dissents from this summary reversal of the courts of Kentucky, which, so far as appears, applied wholly correct constitutional criteria in reaching their decisions.

JUSTICE REHNQUIST, dissenting.

With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case "has *no* secular legislative purpose," *ante*, at 41 (emphasis supplied), and that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," *ibid.* This even though, as the trial court found, "[t]he General Assembly thought the statute had a secular legislative purpose and specifically said so." App. to Pet. for Cert. 37. The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases

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[5] The Supreme Court cases cited by the dissenting opinion as contrary, *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973); *Sloan* v. *Lemon*, 413 U. S. 825 (1973); *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Board of Education* v. *Allen*, 392 U. S. 236 (1968), are easily distinguishable: all are cases involving state assistance to private schools. Such assistance has the obvious legitimate secular purpose of promoting educational opportunity. The posting of the Ten Commandments on classroom walls has no such secular purpose.

and accords such pronouncements the deference they are due. See, *e. g., Committee for Public Education* v. *Nyquist,* 413 U. S. 756, 773 (1973) ("we need touch only briefly on the requirement of a 'secular legislative purpose.' As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests"); *Lemon* v. *Kurtzman,* 403 U. S. 602, 613 (1971) ("the statutes themselves clearly state they are intended to enhance the quality of the secular education"); *Sloan* v. *Lemon,* 413 U. S. 825, 829–830 (1973); *Board of Education* v. *Allen,* 392 U. S. 236, 243 (1968). See also *Florey* v. *Sioux Falls School District,* 619 F. 2d 1311, 1314 (CA8) (upholding rules permitting public school Christmas observances with religious elements as promoting the articulated secular purpose of "advanc[ing] the student's knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization"), cert. denied, *post,* p. 987. The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional. As this Court stated in *McGowan* v. *Maryland,* 366 U. S. 420, 445 (1961), in upholding the validity of Sunday closing laws, "the present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals."

Abington School District v. *Schempp,* 374 U. S. 203 (1963), repeatedly cited by the Court, is not to the contrary. No statutory findings of secular purpose supported the challenged enactments in that case. In one of the two cases considered in *Abington School District* the trial court had determined that the challenged exercises were intended by the State to be religious exercises. *Id.,* at 223. A contrary finding is presented here. In the other case no specific finding had been

made, and "the religious character of the exercise was admitted by the State," *id.*, at 224.[1]

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text," *ante*, at 41. It is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. The trial court concluded that evidence submitted substantiated this determination. App. to Pet. for Cert. 38. See also *Anderson* v. *Salt Lake City Corp.*, 475 F. 2d 29, 33 (CA10 1973) (upholding construction on public land of monument inscribed with Ten Commandments because they have "substantial secular attributes"). Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import. See *id.*, at 34 ("It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era").[2] See also *Opinion of the Justices*, 108 N. H. 97, 228 A. 2d 161 (1967) (upholding placement of plaques with the motto "In God We Trust" in public schools).

The Establishment Clause does not require that the public sector be insulated from all things which may have a religious

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[1] The Court noted that even if the State's purpose were not strictly religious, "it is sought to be accomplished through readings, without comment, from the Bible." 374 U. S., at 224. Here of course there was no compelled reading, and there was comment accompanying the text of the Commandments, mandated by statute and focusing on their secular significance.

[2] The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects.

significance or origin. This Court has recognized that "religion has been closely identified with our history and government," *Abington School District, supra,* at 212, and that "[t]he history of man is inseparable from the history of religion," *Engel* v. *Vitale,* 370 U. S. 421, 434 (1962). Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments. The words of Justice Jackson, concurring in *McCollum* v. *Board of Education,* 333 U. S. 203, 235–236 (1948), merit quotation at length:

> "I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.

WISCONSIN ET AL. *v.* ILLINOIS ET AL.

ON BILL IN EQUITY

No. 1, Orig. Decree April 21, 1930—Decree enlarged May 22, 1933—Decree entered June 12, 1967—Decree amended December 1, 1980*

Decree amended.

Decree reported: 281 U. S. 696; decree enlarged: 289 U. S. 395; decree entered: 388 U. S. 426.

ORDERED:

A. Paragraph 3 of the Decree entered by the Court herein on June 12, 1967, is amended to read as follows:

3. For the purpose of determining whether the total amount of water diverted from Lake Michigan by the State of Illinois and its municipalities, political sub-divisions, agencies and instrumentalities is not in excess of the maximum amount permitted by this decree, the amounts of domestic pumpage from the lake by the State and its municipalities, political sub-divisions, agencies and instrumentalities the sewage and sewage effluent derived from which reaches the Illinois waterway, either above or below Lockport, shall be added to the amount of direct diversion into the canal from the lake and storm runoff reaching the canal from the Lake Michigan watershed computed as provided in Paragraph 2 of this decree. The annual accounting period shall consist of twelve months terminating on the last day of September. A period of forty (40) years, consisting of the current annual accounting period and the previous thirty-nine (39) such periods (all after the effective date of this decree), shall be permitted, when necessary, for achieving an average diversion which is not in excess of the maximum permitted amount; provided, however, that the average diversion in any annual accounting

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*Together with No. 2, Orig., *Michigan* v. *Illinois et al.*, and No. 3, Orig., *New York* v. *Illinois et al.*

period shall not exceed 3680 cubic feet per second, except that in any two (2) annual accounting periods within a forty (40) year period, the average annual diversion may not exceed 3840 cubic feet per second as a result of extreme hydrologic conditions; and, that for the first thirty-nine (39) years the cumulative algebraic sum of each annual accounting period's average diversion minus 3200 cubic feet per second shall not exceed 2000 cubic feet per second-years. All measurements and computations required by this decree shall be made by the appropriate officers, agencies or instrumentalities of the State of Illinois, or the Corps of Engineers of the United States Army subject to agreement with and cost-sharing by the State of Illinois for all reasonable costs including equipment, using the best current engineering practice and scientific knowledge. If made by the State of Illinois, the measurements and computations shall be conducted under the continuous supervision and direction of the Corps of Engineers of the United States Army in cooperation and consultation with the United States Geological Survey, including but not limited to periodic field investigation of measuring device calibration and data gathering. All measurements and computations made by the State of Illinois shall be subject to periodic audit by the Corps of Engineers. An annual report on the measurements and computations required by this decree shall be issued by the Corps of Engineers. Best current engineering practice and scientific knowledge shall be determined within six (6) months after implementation of the decree based upon a recommendation from a majority of the members of a three-member committee. The members of this committee shall be appointed by the Chief of Engineers of the United States Army Corps of Engineers. The members shall be selected on the basis of recognized experience and technical expertise in flow measurement or hydrology. None of the committee members shall be employees of the Corps of Engineers or employees or paid consultants of any of the parties to these proceedings other than

the United States. The Corps of Engineers shall convene such a committee upon implementation of this decree and at least each five (5) years after implementation of this decree to review and report to the Corps of Engineers and the parties on the method of accounting and the operation of the accounting procedure. Reasonable notice of these meetings must be given to each of the parties. Each party to these proceedings shall have the right to attend committee meetings, inspect any and all measurement facilities and structures, have access to any data and reports and be permitted to take its own measurements.

B. Paragraph 5 of the said Decree entered by the Court herein is amended by adding thereto an additional sentence to read as follows:

The amendment to Paragraph 3 of this decree shall take effect on the first day of October following the passage into law by the General Assembly of the State of Illinois of an amendment to the Level of Lake Michigan Act providing that the amount used for dilution in the Sanitary and Ship Canal for water quality purposes shall not be increased above three hundred twenty (320) cubic feet per second, and that in allocations to new users of Lake Michigan water, allocations for domestic purposes be given priority and to the extent practicable allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer.

C. A certified copy of the above legislation shall be served upon the parties and filed with the Clerk of the Supreme Court by the State of Illinois. If no party raises an objection to the adequacy of the legislation within 30 days of service, Illinois will have complied with the requirements of the amendment made by this Order to paragraph 5 of the Decree entered by the Court herein on June 12, 1967. Any such objection shall be raised in the manner set forth in Paragraph 7 of said Decree.

IT IS FURTHER ORDERED THAT:

Each of the parties to this proceeding shall bear its own costs. The expenses of the Special Master shall be borne by the State of Illinois and the Metropolitan Sanitary District of Greater Chicago, three-fifths thereof by the State of Illinois and two-fifths thereof by the Metropolitan Sanitary District of Greater Chicago.

JUSTICE MARSHALL took no part in the consideration or decision of this order.

STATEMENT OF INTENT AND TECHNICAL BASIS FOR PROPOSED AMENDMENTS TO 1967 DECREE

This statement sets forth the intent of the parties and the technical basis for the revisions to certain of the provisions of paragraphs 3 and 5 of the 1967 Decree.

The proposed change in the 1967 Decree has been designed to alter in part the provisions of the existing Decree that prevent Illinois from effectively utilizing and managing the 3200 cubic feet per second (cfs) of Lake Michigan water which Illinois was allocated.

Under the existing system, increasing amounts of impervious areas and increasing demand by domestic users elevate the risk that the language of the decree will be violated in any one or five year period if additional allocations are made by the State to domestic users for a period of years consistent with good management practice.

The proposed change accomplishes the following:

1. Increases the period for determining compliance with the 3200 cfs limit from a five year running average to a forty year running average;
2. During the first thirty-nine years of the decree, allows Illinois to exceed the 3200 cfs limit by 2000 cfs-years in the aggregate (one cfs-year is the volume of water resulting from an average flow of one cfs for a period of one year);

3. Limits the average diversion in any one accounting period to 115% of 3200 cfs, but in two years of any forty year period permits the average diversion to reach 120% of 3200 cfs, to allow for extreme hydrologic conditions.

The lengthening of the averaging period from five to forty years reduces the variability of the averaged figure, thus decreasing the amount of water that needs to be held in reserve for storm water runoff and increasing the amount of water that may be allocated for domestic purposes to reduce in part the pumpage from the Cambrian-Ordovician aquifer.

The lengthening of the averaging period also allows an increase in the planning period to a period of time that is more compatible with the life of certain types of water supply facilities, thus permitting more efficient use of the available diversion without increasing the total allowable diversion, and permitting better management of all the water resources of the region.

In establishing the limits of paragraph three of the amended decree, the available data and uncertainties as to the behavior of and interactions between the various elements of the hydrologic regime under current and future conditions were limiting factors.

To estimate maximum hydrologic variations that must be considered in the allocation accounting process, the forty-four year precipitation and runoff data contained in "Water Yield, Urbanization, and the North Branch of the Chicago River," a report by the Northeastern Illinois Planning Commission and Hydrocomp, Inc., dated October 14, 1976, were used. These data assumed a 30% imperviousness factor and were used by the parties to approximate the conditions of the entire Lake Michigan diversion watershed at the present time.

These data indicate that the maximum departure above the mean annual stormwater flow is 59%. Assuming, there-

fore, that the mean annual stormwater flow is 683 cfs, the maximum departure is 405 cfs. This could result in a diversion of 13% above the allowable 3200 cfs maximum. Given the relatively short period of record and the likelihood of increased runoff resulting from urbanization, it was agreed that a 15% exceedance, to a maximum of 3680 cfs, would be allowed in any year to accommodate high stormflows and that in any two years of the 40 year accounting period the diversion may be increased by 20%, to a maximum of 3840 cfs, to accommodate extraordinary hydrologic conditions.

Because of year-to-year variations in storm runoff there will be series of years when the average annual diversion will need to exceed 3200 cfs for best management, and some years when the diversion will be less than the 3200 cfs average. Calculations of the cumulative sum of the annual departures show that the maximum cumulative exceedance of 3200 cfs would be slightly below 1500 cfs-years as indicated by the forty-four years of data that were used. The possibility exists that in the initial forty year period the cumulative exceedance may be greater than 1500 cfs-years. Since the record used is relatively short and urbanization is likely to increase runoff, the maximum cumulative exceedance has been established at 2000 cfs-years.

The goal of this amended Decree is to maintain the long-term average annual diversion of water from Lake Michigan at or below 3200 cfs.

COUNTY OF IMPERIAL, CALIFORNIA, ET AL. *v.* MUNOZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–1003. Argued October 15, 1980—Decided December 2, 1980

Petitioner county obtained an injunction in a California state court prohibiting the owner of a tract of land from selling water from a well on the premises for use outside the county in violation of a conditional use permit required by a county zoning ordinance and allowing the sale of water only for use within the county. The California Supreme Court affirmed, and this Court dismissed the tract owner's appeal. Meanwhile, respondents, merchants involved in the tract owner's sale of water to Mexico, brought suit in Federal District Court in California, challenging the conditional permit on the ground that it violated the Commerce Clause, and secured a preliminary injunction restraining petitioner county from enforcing the permit. The court rejected the county's argument that the Anti-Injunction Act—which prohibits a federal court from granting an injunction "to stay proceedings in a State court" except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments—operated to prohibit the court from so enjoining the county. The United States Court of Appeals affirmed, holding that the state trial court proceedings had terminated, that the federal injunction, therefore, did not violate the rule that the Anti-Injunction Act cannot be evaded by addressing a federal injunction to the parties rather than the state court, and that, moreover, under *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, third parties were not barred under that Act from challenging a statute on federal constitutional grounds when the statute was also under litigation in the state courts.

Held: The Court of Appeals erred in finding the Anti-Injunction Act inapplicable to prohibit the District Court from enjoining petitioner county from enforcing the tract owner's permit. Pp. 58–60.

(a) The Court of Appeals' view that after a state court has entered an injunction, its proceedings are concluded for Anti-Injunction Act purposes is contrary to the holding of *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, that although a federal injunction against a certain party's giving effect to a state-court injunction was

directed only at that party the injunction was nevertheless one "to stay proceedings in a State court" within the meaning of the Anti-Injunction Act. Pp. 58–59.

(b) *Hale* v. *Bimco Trading, Inc., supra,* does not govern this case, where neither the District Court nor the Court of Appeals addressed the question whether respondents were "strangers to the state court proceeding" who were not bound as though they were parties to such proceeding. Unless respondents were such "strangers," the federal injunction was barred by the Anti-Injunction Act. Pp. 59–60.

604 F. 2d 1174, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 60. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 61. BRENNAN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 62. MARSHALL, J., filed a dissenting statement, *post,* p. 63.

James H. Harmon argued the cause and filed briefs for petitioners.

William H. Kronberger, Jr., argued the cause for respondents. With him on the briefs was *Murry Luftig.**

JUSTICE STEWART delivered the opinion of the Court.

The Anti-Injunction Act, 28 U. S. C. § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This case presents issues respecting the scope of that Act.

I

In 1972, Donald C. McDougal bought from W. Erle Simpson a tract of land in Imperial County, Cal. Although the

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**Donald McDougal, Jr.,* filed a brief for Donald C. McDougal as *amicus curiae.*

tract was in a residential subdivision, the county's zoning ordinance allowed the tract's owner to develop its natural resources if he could obtain a conditional-use permit. With the land, McDougal acquired such a permit, which allowed him to sell well water on the condition that it be sold only for use within the county. Simpson had never challenged that condition, nor had he ever sold much water from his well. Like Simpson, McDougal did not challenge the condition, but he did sell a good deal of water, and he sold some of it for use outside the county. McDougal's neighbors grew irritated by the many trucks carrying water from McDougal's premises, and they complained to the county. The county sought to vindicate its zoning ordinance and permit by asking a California Superior Court for injunctive and declaratory relief that would prohibit McDougal from selling water for consumption outside the county.

The state trial court enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972." [1] On appeal to the California Supreme Court, McDougal argued that the permit's geographic restriction was invalid. The state appellate court declined to reach that argument, since "a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." *County of Imperial* v. *McDougal*, 19 Cal. 3d 505, 510–511, 564 P. 2d 14, 18. The California Supreme Court thus affirmed the Superior Court's decision that the sale of water outside the county violated the ordinance, although it reversed the Superior Court's finding that the frequent truck traffic at McDougal's premises violated the zoning ordinance. McDougal appealed that

[1] The state trial court opinion is unreported.

judgment to this Court, which dismissed his appeal for want of a substantial federal question. 434 U. S. 944.

The respondents in this case are Mexican merchants: Respondent Munoz has a contract with McDougal to be his broker in arranging sales of water to Mexico; respondents Martinez and De Leon have agreed to purchase McDougal's water for consumption in Mexico. Although none of the respondents was a named party to the suit against McDougal in the state courts, all of them were interested and—to an undetermined degree—involved in it, and Munoz participated as *amicus curiae* before the California Supreme Court. Twelve days after that court had denied McDougal's petition for rehearing, and even before this Court had dismissed his appeal, the respondents initiated the present litigation by filing in the United States District Court for the Southern District of California a complaint seeking declaratory and injunctive relief to prevent the County of Imperial from enforcing the terms of McDougal's conditional permit. They argued in the District Court that those terms violated the Commerce Clause of the Constitution. Art. I, § 8, cl. 3. The District Court concluded that respondents would suffer irreparable harm were there no injunction, and that they would probably succeed on the merits. Accordingly, the court issued a preliminary injunction restraining the county "from enforcing the restriction in the use permit which prohibits sale of water for use outside Imperial County." [2]

Some months later, the California Superior Court ordered McDougal to show cause why he should not be held guilty of contempt for violating the court's injunction by selling water for use outside the county. After proceedings in which the county participated, he was found guilty of contempt and again ordered to cease selling water for use outside of Imperial County. That order was stayed, however, pending

[2] The District Court opinion is unreported.

the outcome of the county's appeal of the federal trial court's order to the United States Court of Appeals for the Ninth Circuit. Subsequently, the Court of Appeals affirmed the District Court's order of preliminary injunction, 604 F. 2d 1174, and this Court granted the county's petition for a writ of certiorari. 445 U. S. 903.

II

The county has maintained throughout the present litigation that the Anti-Injunction Act operates to prohibit the District Court from enjoining it from enforcing the terms of McDougal's permit. In rejecting that argument, the District Court cited *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, and said that "this court may, if otherwise appropriate, restrain the operation of an unconstitutional statute; surely it does not lose the right to do so merely because the statute has been tested in the state courts." In reaching the same conclusion, the Court of Appeals reasoned that the state trial court proceedings had terminated, and that the injunction, therefore, did not violate the rule that the Act cannot be evaded by addressing a federal injunction to the parties rather than to the state court. It also agreed with the District Court that, under the *Hale* case, "third parties are not barred under the Anti-Injunction Act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state courts." 604 F. 2d, at 1176.

In our view the threshold reasoning of the Court of Appeals disregarded the teaching of this Court's opinion in *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281. In that case, the railroad had secured a state-court injunction prohibiting the union from picketing a railroad facility. Two years later, the union tried but failed to convince the state court to dissolve the injunction in light of an intervening decision of this Court. The union did not appeal that decision, but instead persuaded a federal court

to enjoin the railroad "from giving effect to or availing [itself] of the benefits of" the state-court injunction. *Id.*, at 287. This Court held that "although this federal injunction is in terms directed only at the railroad it is an injunction 'to stay proceedings in a State court.' " *Ibid.* The view of the Court of Appeals in the present case that after a state court has entered an injunction, its proceedings are concluded for the purposes of the Anti-Injunction Act was thus contrary to the square holding of the *Atlantic Coast Line* case.

The Court of Appeals' final reason (and the District Court's only reason) for finding the Act inapplicable was this Court's decision in *Hale* v. *Bimco Trading, Inc., supra.* There, a cement company had secured from a state court a writ of mandamus ordering the state road department to enforce a statute requiring the inspection of cement imported into the State. Bimco Trading, Inc., subsequently obtained a federal-court injunction restraining the road department from enforcing the statute. This Court held that 28 U. S. C. § 379 (1934 ed.)—the predecessor of the current Anti-Injunction Act—did not bar the federal injunction, since to hold otherwise would have been to

> "assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceeding bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so." 306 U. S., at 377–378.

Neither the District Court nor the Court of Appeals addressed the question whether respondents in this case were "strangers to the state court proceeding" who were not bound "as though [they were parties] to the litigation in the state

court." [3] Unless respondents were such "strangers," the injunction they sought was barred by the Act.[4]

Accordingly, the judgment is vacated, and the case is remanded to the Court of Appeals.

It is so ordered.

JUSTICE POWELL, concurring.

Although I join the opinion of the Court on the basis of its reading of *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939), I record my willingness to reconsider *Hale*. It has rarely been cited and—as the Court reads it today—it creates an

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[3] The dissenting opinion today rests entirely on the supposition that the Court of Appeals has already decided this question. That supposition is demonstrably untenable:

The Court of Appeals found that the Anti-Injunction Act was inapplicable, and proceeded to consider the merits of the petitioners' res judicata defense, a defense based upon the judgment in the state litigation. The court held that the doctrine of res judicata did not in any event apply in the circumstances here presented, and accordingly explicitly declined to consider whether the respondents had been "in privity" with McDougal in the state litigation. Since the court did not even decide that the respondents had not been in privity with McDougal in the state litigation, it most assuredly could not have decided and did not decide that the respondents were "strangers to the state court proceeding."

[4] The respondents contend that their suit comes within one of the statutory exceptions to the Act. First, they urge that the "in aid of jurisdiction" exception applies. They apparently reason that the District Court was not barred from entering a declaratory judgment, that a declaratory judgment unsupported by an injunction would be a nullity, and that therefore an injunction was necessary "in aid of" the District Court's subject-matter jurisdiction over Commerce Clause questions. This argument proves too much, since by its reasoning the exception, and not the rule, would always apply. Second, respondents assert that this case falls within the exception to the Act for injunctions "expressly authorized by Act of Congress." They cite *Mitchum* v. *Foster*, 407 U. S. 225, for the undoubted proposition that suits under 42 U. S. C. § 1983 are within that exception. This argument cannot prevail, however, for the simple reason that the respondents' complaint did not rely on or even so much as mention § 1983.

exception to the coverage of the Anti-Injunction Act that I think is contrary to the policy of that Act.

JUSTICE BLACKMUN, concurring in the result.

For me, the Court's opinion is somewhat opaque. Perhaps it is intentionally so.

I agree with JUSTICE BRENNAN that respondents were—and were necessarily determined by the Court of Appeals to be—"strangers to the state court proceeding," *post*, at 62, who were not bound by the state-court litigation. No principle of res judicata evoked by the California litigation applies to them.

I join the Court in vacating the Court of Appeals' judgment and remanding the case, however, for I am troubled by that court's apparent misreading of *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281 (1970), and by its analysis of the effect of the Anti-Injunction Act, 28 U. S. C. § 2283, upon the particular facts of this case.

At the same time, I am disturbed by what seems to me to be the implication of this Court's opinion, namely, that the Anti-Injunction Act does not apply when the state litigation involves different parties. If I am correct that this is the premise, I believe that the Court is indulging in a new exposition of the meaning of *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939). The Anti-Injunction Act imposes a flat and positive prohibition. It then allows three exceptions. None of those exceptions is applicable to the situation before us, which involves a single-use restriction on a single parcel of land. The precedent of *Hill* v. *Martin*, 296 U. S. 393, 403 (1935), *Atlantic Coast Line R. Co., supra*, and *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U. S. 623, 630 (1977), supports a conclusion that the Anti-Injunction Act bars the federal court from issuing an injunction against enforcement of this use restriction. Yet, a holding to that effect would not oust the federal court of jurisdiction to order other forms of relief, such as a declaratory judgment. It is worth noting, or so it

appears to me, that the state court has made clear, by its stay of the contempt order, that it will abide by the federal resolution of the constitutional issue.*

The situation presented by this case is an inevitable result of our having two independent judicial systems. The Anti-Injunction Act cannot eliminate all conflicts, and was not so intended. It precludes federal injunctions that interfere with state proceedings. Heretofore, this Court has applied the Act's restrictions strictly. I would expect that approach to be continued.

JUSTICE BRENNAN, with whom JUSTICE STEVENS joins, dissenting.

To vacate and remand to the Court of Appeals to determine whether respondents were "strangers to the state court proceeding" within the meaning of *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, 377–378 (1939), is to require the Court of Appeals to perform a task it undoubtedly has already performed. The Court of Appeals concluded that respondents' lawsuit did not contravene the Anti-Injunction Act, 28 U. S. C. § 2283, and relied on *Hale* as a basis for its conclusion. Necessarily implicit in that conclusion was the court's judgment that the *Hale* test had in all pertinent respects been satisfied and that, accordingly, respondents were "strangers to the state court proceeding." [1]

The Court identifies nothing in the record to support a conclusion that respondents were not "strangers to the state court proceeding," apart, perhaps, from respondent Munoz' participation as *amicus curiae* before the California Supreme

*_Hale_ v. _Bimco Trading, Inc._, 306 U. S. 375 (1939), is distinguishable, for that case involved an attack on a state statute and a complete legislative scheme that was being applied to many parties in many different circumstances. That situation differs significantly from the particularized use restriction with which the present litigation is concerned.

[1] The District Court similarly concluded that *Hale* v. *Bimco Trading, Inc.*, did not bar the instant lawsuit and thus necessarily also found that respondents were "strangers to the state court proceeding."

Court. Even if *amicus* status were sufficient to require Munoz' withdrawal as a party,[2] it is undisputed that neither respondent Martinez nor respondent De Leon played any role in the state-court litigation. The Court's statement that "all of [the respondents] were interested and—to an undetermined degree—involved in it," *ante*, at 57, is, therefore, unfounded.[3]

Under these circumstances, to require the Court of Appeals to find—yet again—that respondents were "strangers to the state court proceeding" is an unnecessary waste of judicial resources. Accordingly, I dissent from the remand and would affirm.

JUSTICE MARSHALL also dissents but would dismiss the writ as improvidently granted.

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[2] The language of *Hale* quoted by the Court, *ante*, at 59, suggests that *amicus* status does not impair one's standing as a "stranger," since the Court contrasted an "independent suitor in the federal court" with "a party to the litigation in the state court." 306 U. S., at 378. Munoz clearly was not such a party.

[3] The District Court stated:

"But the plaintiffs herein have no common property interest with McDougal. At issue in the state proceeding was McDougal's use permit; the use permit is a part of the land and runs with the land, as the California Supreme Court expressly held. The plaintiffs have no property interest in McDougal's land or in his use permit. Their interest is in the steps taken by the County to enforce what they perceive as an unconstitutional ordinance. Therefore, since the property interest which was litigated in the state courts was exclusively McDougal's and not the plaintiffs', it must follow that the plaintiffs were not in privity with McDougal and his state court judgment does not bar them from proceeding with this lawsuit." App. to Pet. for Cert. B–5.

While it is true, as the Court notes, *ante*, at 60, n. 3, that the Court of Appeals, unlike the District Court, "declined to consider whether the respondents had been 'in privity' with McDougal in the state litigation," that refusal has no bearing on the disposition of petitioners' Anti-Injunction Act claim. With respect to that claim, the court necessarily found that respondents were "strangers to the state court proceeding," and its disposition of the res judicata claim on a ground other than privity is irrelevant.

ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-770. Argued October 7, 1980—Decided December 2, 1980*

Under § 301 (b) of the Federal Water Pollution Control Act, the Environmental Protection Agency (EPA) is to set 1977 effluent limitations for categories of point sources, requiring such sources to meet standards based on application of the "best practicable control technology currently available" (BPT), and 1987 limitations, requiring all point sources to meet standards based on application of the "best available technology economically achievable" (BAT). Section 301 (c) of the Act provides for variances from 1987 BAT effluent limitations for individual point sources upon a showing "that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operators; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." However, the Act contains no similar variance provision authorizing consideration of the economic ability of the individual operator to meet the cost of complying with 1977 BPT standards. In 1977, the EPA promulgated BPT pollution discharge limitations for the coal mining industry and for certain portions of the mineral mining and processing industry. Under the regulations, a greater than normal cost of implementation will be considered in acting on a request for a variance, but a variance will not be granted on the basis of the applicant's economic inability to meet the cost of implementing the uniform standard. Respondents sought review of the regulations in various Courts of Appeals, challenging both the substantive standards and the variance clause. All of the petitions were transferred to the Court of Appeals for the Fourth Circuit, which set aside the variance provision as unduly restrictive and required the EPA to consider, *inter alia*, the factors set out in § 301 (c), including the applicant's economic capability.

Held: The Court of Appeals erred in not accepting the EPA's interpretation of the Act. The EPA is not required by the Act to consider eco-

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*Together with *Costle, Administrator, Environmental Protection Agency* v. *Consolidation Coal Co. et al.*, also on certiorari to the same court (see this Court's Rule 19.4).

nomic capability in granting variances from its uniform BPT standards. Pp. 73–85.

(a) The statute's plain language does not support the Court of Appeals' position. Section 301 (c)'s requirement for a BAT variance of "reasonable further progress" toward the elimination of pollutant discharges refers to the prior BPT standard, but there is no comparable prior standard with respect to BPT limitations. And since BPT limitations do not require an industrial category to commit the maximum resources economically possible to pollution control, even if affordable, the § 301 (c) BAT variance factor as to the maximum use of technology within the applicant's economic capability is inapposite in the BPT context. More importantly, under the Act, the Administrator of the EPA, in determining BPT limitations, is directed to consider the benefits of effluent reductions as compared to the cost of pollution control in defining the best practicable technology at a level that would effect the 1977 goal of substantially reducing total pollution produced by each industrial category. Thus, the statute contemplated regulations that would require a substantial number of point sources with the poorest performances either to conform to BPT standards or to cease production. To allow a BPT variance based on economic capability and not to require adherence to the prescribed minimum technology would permit the employment of the very practices that the Administrator had rejected in establishing the best practicable technology currently available in the industry. Pp. 73–78.

(b) The EPA's interpretation of the statutory language is also supported by the legislative history, which shows that Congress understood that the economic capability provision of § 301 (c) was limited to BAT variances; foresaw and accepted the economic hardship, including the closing of some plants, that BPT effluent limitations would cause; and took certain steps to alleviate this hardship, steps which did not include allowing a BPT variance based on economic capability. Pp. 79–83.

(c) In the face of § 301 (c)'s explicit limitation to BAT variances and in the absence of any other specific direction in the statute to provide for BPT variances in connection with permits for individual point sources, the Administrator adopted a reasonable construction of the statutory mandate, and the Court of Appeals erred in concluding that, since BAT limitations are to be more stringent than BPT limitations, the variance provision for the latter must be at least as flexible as that for the former with respect to affordability. Pp. 83–84.

601 F. 2d 111 and 604 F. 2d 239, reversed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

Andrew J. Levander argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General MacBeth,* and *Michele B. Corash.*

George C. Freeman, Jr., argued the cause for respondents Consolidation Coal Co. et al. *Theodore L. Garrett* argued the cause for respondents National Crushed Stone Association et al. With Messrs. Freeman and Garrett on the brief were *Michael B. Barr, Robert F. Stauffer, Lawrence A. Demase, Frank J. Clements,* and *Ronald R. Janke.*†

JUSTICE WHITE delivered the opinion of the Court.

In April and July 1977, the Environmental Protection Agency (EPA), acting under the Federal Water Pollution Control Act (Act), as amended, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.,* promulgated pollution discharge limitations for the coal mining industry and for that portion of the mineral mining and processing industry comprising the crushed-stone, construction-sand, and gravel categories.[1] Although the Act does not expressly authorize or require variances from the 1977 limitation, each set of regulations contained a variance provision.[2] Respondents sought review of the regulations in

†*J. Taylor Banks* and *Ronald J. Wilson* filed a brief for the Natural Resources Defense Council, Inc., as *amicus curiae* urging reversal.

William W. Becker filed a brief for the New England Legal Foundation as *amicus curiae* urging affirmance.

[1] The coal mining standards were published at 42 Fed. Reg. 21380 *et seq.* (1977), adopting 40 CFR Part 434. The mineral mining and processing standards were published at 42 Fed. Reg. 35843 *et seq.* (1977), adopting 40 CFR Part 436.

[2] The variance provision reads as follows:

"In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with

various Courts of Appeals, challenging both the substantive standards and the variance clause.[3] All of the petitions for review were transferred to the Court of Appeals for the Fourth Circuit. In *National Crushed Stone Assn.* v. *EPA*, 601 F. 2d 111 (1979), and in *Consolidation Coal Co.* v. *Costle*, 604 F. 2d 239 (1979), the Court of Appeals set aside the

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respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitation must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations."

See 40 CFR § 434.22 (1980) (coal preparation plants); § 434.32 (acid mine drainage); § 434.42 (alkaline mine drainage); § 436.22 (crushed stone) and § 436.32 (construction sand and gravel).

[3] The actions were brought under § 509 (b) (1) (E), which, as set forth in 33 U. S. C. § 1369 (b) (1) (E), gives the courts of appeals jurisdiction to review "the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 1311 . . . of this title. . . ." Plaintiffs in *National Crushed Stone* were three producers and their trade association. Plaintiffs in *Consolidation Coal* were 17 coal producers, their trade association, 5 citizens' environmental associations, and the Commonwealth of Pennsylvania.

variance provision as "unduly restrictive" and remanded the provision to EPA for reconsideration.[4]

To obtain a variance from the 1977 uniform discharge limitations a discharger must demonstrate that the "factors relating to the equipment or facilities involved, the process applied, or other such factors relating to such discharger are fundamentally different from the factors considered in the establishment of the guidelines." Although a greater than normal cost of implementation will be considered in acting on a request for a variance, economic ability to meet the costs will not be considered.[5] A variance, therefore, will not be granted on the basis of the applicant's economic inability to meet the costs of implementing the uniform standard.

The Court of Appeals for the Fourth Circuit rejected this position. It required EPA to "take into consideration, among other things, the statutory factors set out in § 301 (c)," which authorizes variances from the more restrictive pollution limitations to become effective in 1987 and which specifies economic capability as a major factor to be taken into account.[6] The court held that

"'if [a plant] is doing all that the maximum use of

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[4] In *National Crushed Stone*, the Court of Appeals also vacated and remanded the substantive regulations. That action is not before the Court. In *Consolidation Coal*, the substantive regulations were upheld.

[5] EPA has explained its position as follows:

"Thus a plant may be able to secure a BPT variance by showing that the plant's own compliance costs with the national guideline limitation would be x times greater than the compliance costs of the plants EPA considered in setting the national BPT limitation. A plant may not, however, secure a BPT variance by alleging that the plant's own financial status is such that it cannot afford to comply with the national BPT limitation." 43 Fed. Reg. 50042 (1978).

[6] Section 301 (c), 86 Stat. 844, 33 U. S. C. § 1311 (c), allows the Administrator to grant a variance "upon a showing by the owner or operator . . . that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or opera-

technology within its economic capability will permit and if such use will result in reasonable further progress toward the elimination of the discharge of pollutants . . . no reason appears why [it] should not be able to secure such a variance should it comply with any other requirements of the variance.'" 601 F. 2d, at 124, quoting from *Appalachian Power Co.* v. *Train*, 545 F. 2d 1351, 1378 (CA4 1976).

We granted certiorari to resolve the conflict between the decisions below and *Weyerhaeuser Co.* v. *Costle*, 191 U. S. App. D. C. 309, 590 F. 2d 1011 (1978), in which the variance provision was upheld. 444 U. S. 1069.

I

We shall first briefly outline the basic structure of the Act, which translates Congress' broad goal of eliminating "the discharge of pollutants into the navigable waters," 33 U. S. C. § 1251 (a)(1), into specific requirements that must be met by individual point sources.[7]

Section 301 (b) of the Act, 33 U. S. C. § 1311 (b) (1976 ed. and Supp. III), authorizes the Administrator to set effluent limitations for categories of point sources.[8] With respect to existing point sources, the section provides for implementation of increasingly stringent effluent limitations in two steps. The first step to be accomplished by July 1, 1977, requires all point sources to meet standards based on "the application of

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tor; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

[7] A "point source" is defined as "any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged." § 502 (14), 33 U. S. C. § 1362 (14) (1976 ed., Supp. III).

[8] Throughout this opinion "Administrator" refers to the Administrator of EPA. In *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977), we sustained the Administrator's authority to issue the 1977 effluent limitations.

the best practicable control technology currently available [BPT] as defined by the Administrator . . . ." § 301 (b)(1)(A). The second step, to be accomplished by July 1, 1987, requires all point sources to meet standards based on application of the "best available technology economically achievable [BAT] for such category or class . . . ."[9] § 301 (b)(2)(A). Both sets of limitations—BPT's followed within 10 years by BAT's—are to be based upon regulatory guidelines established under § 304 (b).

Section 304 (b) of the Act, 33 U. S. C. § 1314 (b), is again divided into two sections corresponding to the two levels of technology, BPT and BAT. Under § 304 (b)(1) the Administrator is to quantify "the degree of effluent reduction attainable through the application of the best practicable control technology currently available [BPT] for classes and categories of point sources . . . ." In assessing the BPT the Administrator is to consider

> "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U. S. C. § 1314 (b)(1)(B).

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[9] The Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, required that the second-stage standards be met by 1983. This deadline was extended in the Clean Water Act of 1977, 91 Stat. 1567. Depending on the nature of the pollutant, the deadline for the more stringent limitations now falls between July 1, 1984, and July 1, 1987. The 1977 Act also replaced the BAT standard with a new standard, "best conventional pollutant control technology [BCT]," for certain so-called "conventional pollutants." 33 U. S. C. § 1311 (b)(2)(E) (1976 ed., Supp. III). The distinction between BCT and BAT is not relevant to the issue presented here.

Similar directions are given the Administrator for determining effluent reductions attainable from the BAT except that in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits.[10]

Section 402 authorizes the establishment of the National Pollutant Discharge Elimination System (NPDES), under which every discharger of pollutants is required to obtain a permit. The permit requires the discharger to meet all the applicable requirements specified in the regulations issued under § 301. Permits are issued by either the Administrator or state agencies that have been approved by the Administrator.[11] The permit "transform[s] generally applicable effluent limitations . . . into the obligations (including a timetable for compliance) of the individual discharger. . . ." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205 (1976).

Section 301 (c) of the Act explicitly provides for modifying the 1987 (BAT) effluent limitations with respect to individual point sources. A variance under § 301 (c) may be obtained upon a showing "that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination

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[10] Senator Muskie, the principal Senate sponsor of the Act, described the "limited cost-benefit analysis" employed in setting BPT standards as being intended to "limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction. . . ." Remarks of Senator Muskie reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress) Ser. No. 93–1, p. 170 (1973) (hereafter Leg. Hist.). Section 304 (b)(2)(B) lists "cost" as a factor to consider in assessing BAT, although it does not state that costs shall be considered in relation to effluent reduction.

[11] Establishment of state permit programs is authorized by § 402 (b), 33 U. S. C. § 1342 (b) (1976 ed., Supp. III). At present, over 30 States and covered territories operate their own NPDES programs.

of the discharge of pollutants." Thus, the economic ability of the individual operator to meet the costs of effluent reductions may in some circumstances justify granting a variance from the 1987 limitations.

No such explicit variance provision exists with respect to BPT standards, but in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977), we indicated that a variance provision was a necessary aspect of BPT limitations applicable by regulations to classes and categories of point sources. *Id.*, at 128. The issue in this case is whether the BPT variance provision must allow consideration of the economic capability of an individual discharger to afford the costs of the BPT limitation. For the reasons that follow, our answer is in the negative.[12]

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[12] In *Du Pont*, we held that pre-enforcement review of the BPT variance provision would be "premature," 430 U. S., at 128, n. 19. In its petition for certiorari in this case, EPA argued that the Court of Appeals erred in reviewing the variance clause prior to application of the regulation to a particular discharger's request for a variance. EPA has now abandoned this position. We agree with the Court of Appeals that whatever may have been true at the time of *Du Pont*, pre-enforcement review of the variance provision is no longer premature since EPA has now taken the definitive position that the factors specified in § 301 (c) apply only to BAT limitations, and not to BPT limitations. See 43 Fed. Reg. 44847–44848, 50042 (1978); 44 Fed. Reg. 32893–32894 (1979). But cf. n. 25, *infra*. The Court of Appeals for the District of Columbia Circuit reached the same conclusion in considering the identical variance clause in the context of BPT standards for paper mills:

"In the three years that have now elapsed since *du Pont* was briefed and argued in the Fourth Circuit, however, enough indicia of the Agency's attitude toward the 1977 variance provision under the Act has [*sic*] accumulated so that its administration is anything but 'a matter of speculation.'" *Weyerhaeuser Co.* v. *Costle*, 191 U. S. App. D. C. 309, 330, 590 F. 2d 1011, 1032 (1978) (citation omitted).

This is the proper result under the twofold test articulated in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967), for evaluating the ripeness of administrative action. First, the issue is "fit" for judicial decision, because it involves only a question of law: whether the Court of

II

The plain language of the statute does not support the position taken by the Court of Appeals. Section 301 (c) is limited on its face to modifications of the 1987 BAT limitations. It says nothing about relief from the 1977 BPT requirements. Nor does the language of the Act support the position that although § 301 (c) is not itself applicable to BPT standards, it requires that the affordability of the prescribed 1977 technology be considered in BPT variance decisions.[13]

Appeals properly construed the Act to require EPA to consider § 301 (c) factors in granting BPT variances. Second, failure to review the variance issue now would cause "hardship" to the parties. The regulations in question affect thousands of point sources throughout the country—about 4,800 crushed-stone facilities and 6,000 coal facilities, many of them involved in this case through their trade associations. The resolution of this conflict will determine for some of these plants whether they will continue to exist or not, and for many others it will determine the level of funding they must budget for pollution controls. They should not be left to speculate on what the regulations require of them. Similarly, EPA represents to the Court that a failure to resolve the issue will cause some hardship to EPA: "a present ruling . . . would advance rather than impede the administrative enforcement of the Act." Brief for Petitioners 21, n. 17.

Moreover, in *Du Pont, supra,* we held that a uniform BPT effluent regulation must contain a variance provision, if it is to be valid. EPA has definitively stated that economic capability will not be a ground for a variance. Section 509 (b)(1)(E) provides for judicial review of effluent limitations promulgated pursuant to § 301, and these actions were brought under that section. Since the variance clause is an integral part of the regulation, review of the regulation must reach the question of whether this limitation on the scope of the variance provision renders the regulation invalid under *Du Pont.*

Finally, the fact that the Court of Appeals for the Fourth Circuit held the variance provision to be invalid, while the Court of Appeals for the District of Columbia Circuit in *Weyerhaeuser, supra,* upheld the same provision provides yet another reason for this Court to settle this controversy at this time. For all of these reasons, the issue is ripe for judicial review.

[13] It is true that in *Du Pont* we said there "[was no] radical difference in the mechanism used to impose limitations for the 1977 and the 198[7] deadlines" and that "there is no indication in either § 301 or § 304 that

This would be a logical reading of the statute only if the factors listed in § 301 (c) bore a substantial relationship to the considerations underlying the 1977 limitations as they do to those controlling the 1987 regulations. This is not the case.

The two factors listed in § 301 (c)—"maximum use of technology within the economic capability of the owner or operator" and "reasonable further progress toward the elimination of the discharge of pollutants"—parallel the general definition of BAT standards as limitations that "require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward . . . eliminating the discharge of all pollutants . . . ." § 301 (b)(2). A § 301 (c) variance, thus, creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class. As with the general BAT standard, the variance assumes that the 1977 BPT standard has been met by the point source and that the modification represents a commitment of the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges.

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the § 304 guidelines play a different role in setting 1977 limitations." 430 U. S., at 127. But our decision in *Du Pont* was that the 1977 limitations, like the 1987 limitations, could be set by regulation and for classes of point sources. It dealt with the power of the Administrator and the procedures he was to employ. There was no suggestion, nor could there have been, that the 1977 BPT and the 1987 BAT limitations were to have identical purposes or content. It follows that no proper inference could be drawn from *Du Pont* that the grounds for issuing variances from the 1987 limitations should also be the grounds for permitting individual point sources to depart from 1977 standards. Indeed, our opinion recognized that § 301 (c) was designed for BAT limitations, 430 U. S., at 121, 127, n. 17. Had we thought that § 301 (c) governed variances from both the BAT and BPT standards, there would have been no need to postpone to another day, as we did in 430 U. S., at 128, n. 19, the question whether the variance clause contained in the 1977 regulations had the proper scope. That scope would have been defined by § 301 (c).

No one who can afford the best available technology can secure a variance.

There is no similar connection between § 301 (c) and the considerations underlying the establishment of the 1977 BPT limitations. First, § 301 (c)'s requirement of "reasonable further progress" must have reference to some prior standard. BPT serves as the prior standard with respect to BAT. There is, however, no comparable, prior standard with respect to BPT limitations.[14] Second, BPT limitations do not require an industrial category to commit the maximum economic resources possible to pollution control, even if affordable. Those point sources already using a satisfactory pollution control technology need take no additional steps at all. The § 301 (c) variance factor, the "maximum use of technology within the economic capability of the owner or operator," would therefore be inapposite in the BPT context. It would not have the same effect there that it has with respect to BAT's, *i. e.*, it would not apply the general requirements to an individual point source.

More importantly, to allow a variance based on the maximum technology affordable by the point source, even if that technology fails to meet BPT effluent limitations, would undercut the purpose and function of BPT limitations. Rather than the 1987 requirement of the best measures economically and technologically feasible, the statutory provisions for 1977 contemplate regulations prohibiting discharges from any point source in excess of the effluent produced by the best practicable technology currently available

[14] Also, the ultimate goal expressed in § 301 (c), "the elimination of the discharge of pollutants," reflects the "national goal" specified in § 301 (b) (2) (A) of "eliminating the discharge of all pollutants." This is not the aim of a BPT limitation; its more modest purpose is to effect a first step toward this goal. Thus, while BAT limitations may be regarded as falling between a level of effluent reduction already achieved and the ultimate goal, the frame of reference within which BPT limitations are established contains neither the prior nor the subsequent measure.

in the industry. The Administrator was referred to the industry and to existing practices to determine BPT. He was to categorize point sources, examine control practices in exemplary plants in each category, and, after weighing benefits and costs and considering other factors specified by § 304, determine and define the best practicable technology at a level that would effect the obvious statutory goal for 1977 of substantially reducing the total pollution produced by each category of the industry.[15] Necessarily, if pollution is to be diminished, limitations based on BPT must forbid the level of effluent produced by the most pollution-prone segment of the industry, that segment not measuring up to "the average of the best existing performance." So understood, the statute contemplated regulations that would require a substantial number of point sources with the poorest performances either to conform to BPT standards or to cease production. To allow a variance based on economic capability and not to require adherence to the prescribed minimum technology would permit the employment of the very practices that the Administrator had rejected in establishing the best practicable technology currently in use in the industry.

To put the matter another way, under § 304, the Administrator is directed to consider the benefits of effluent reductions as compared to the costs of pollution control in determining BPT limitations. Thus, every BPT limitation represents a conclusion by the Administrator that the costs imposed on the industry are worth the benefits in pollution reduction

[15] EPA defines BPT as "the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category or subcategory. This average is not based upon a broad range of plants within an industrial category or subcategory, but is based upon performance levels achieved by exemplary plants." 39 Fed. Reg. 6580 (1974). See also EPA, Effluent Guidelines Div., Development Document for Mineral Mining and Processing Point Source Category 409 (1979) and Development Document for Coal Mining 225 (1976). Support for this definition is found in the legislative history, Leg. Hist. 169–170 (remarks of Sen. Muskie); *id.*, at 231 (remarks of Rep. Jones).

that will be gained by meeting those limits. To grant a variance because a particular owner or operator cannot meet the normal costs of the technological requirements imposed on him, and not because there has been a recalculation of the benefits compared to the costs, would be inconsistent with this legislative scheme and would allow a level of pollution inconsistent with the judgment of the Administrator.[16]

In terms of the scheme implemented by BPT limitations, the factors that the Administrator considers in granting variances do not suggest that economic capability must also be a determinant. The regulations permit a variance where "factors relating to the equipment or facilities involved, the process applied, or such other factors relating to such discharger are fundamentally different from the factors considered in the establishment of the guidelines." If a point source can show that its situation, including its costs of compliance, is not within the range of circumstances considered by the Administrator, then it may receive a variance, whether or not the source could afford to comply with the minimum standard.[17] In such situations, the variance is an acknowledg-

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[16] Respondents fail to consider this tension between a general calculation of costs and benefits and a particularized consideration of costs when they argue that because EPA only has authority to promulgate industrywide BPT regulations by analogy to its authority to promulgate industrywide BAT regulations, the same kind of economic capability/effluent reduction balancing relevant to a BAT variance must apply as well to a BPT variance.

[17] Respondents argue that precluding consideration of economic capability in determining whether to grant a variance effectively precludes consideration of the "total costs" for the individual point source. Respondents rely upon a statement by Representative Jones as to the meaning of "total cost" in § 304 (b) (1) (B):

"internal, or plant, costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation and rural area economic development sustained by the community, area, or region." Leg. Hist. 231.

Unless economic capability is considered, it is argued, it will be impossible

ment that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete. A variance based on economic capability, however, would not have this character: it would allow a variance simply because the point source could not afford a compliance cost that is not fundamentally different from those the Administrator has already considered in determining BPT. It would force a displacement of calculations already performed, not because those calculations were incomplete or had unexpected effects, but only because the costs happened to fall on one particular operator, rather than on another who might be economically better off.

Because the 1977 limitations were intended to reduce the total pollution produced by an industry, requiring compliance with BPT standards necessarily imposed additional costs on the segment of the industry with the least effective technology. If the statutory goal is to be achieved, these costs must be borne or the point source eliminated. In our view, requiring variances from otherwise valid regulations where dischargers cannot afford normal costs of compliance would undermine the purpose and the intended operative effect of the 1977 regulations.

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to consider the potential external costs of meeting a BPT limitation, caused by a plant closing. Although there is some merit to respondents' contention, we do not believe it supports the decision of the Court of Appeals. The court did not hold that economic capability is relevant only if it discloses "fundamentally different" external costs from those considered by EPA in establishing the BPT limitation; rather, the court held that the factors included in § 301 (c) *must* be taken into consideration. Section 301 (c) makes economic capability, regardless of its effect on external costs, a ground for a variance. It is this position that we reject.

III

The Administrator's present interpretation of the language of the statute is amply supported by the legislative history, which persuades us that Congress understood that the economic capability provision of § 301 (c) was limited to BAT variances; that Congress foresaw and accepted the economic hardship, including the closing of some plants, that effluent limitations would cause; and that Congress took certain steps to alleviate this hardship, steps which did not include allowing a BPT variance based on economic capability.[18]

There is no indication that Congress intended § 301 (c) to reach further than the limitations of its plain language. The statement of the House managers of the Act described § 301 (c) as "not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of 'best practicable control technology.'" Leg. Hist. 232. The Conference Report noted that a § 301 (c) variance could only be granted after the effective date of BPT limitations

[18] Since any variance provision will permit nonuniformity with the general BPT standard for a given category, we cannot attribute much weight to those passages in the legislative history, to which EPA points, that express a desire and expectation that "each polluter within a category or class of industrial sources . . . achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977." See Leg. Hist. 162 (statement of Sen. Muskie). See also, *e. g.*, *id.*, at 170; *id.*, at 302, 309 (Conference Report); *id.*, at 787 (Report of House Committee on Public Works). Moreover, EPA has itself stated that a variance does not represent an exception to BPT or BAT limitations, but rather sets an individualized BPT or BAT limitation for that point source: "No discharger . . . may be excused from the Act's requirement to meet BPT [and] BAT . . . through this variance clause. A discharger may instead receive an individualized definition of such a limitation or standard where the nationally prescribed limit is shown to be more or less stringent than appropriate for the discharger under the Act." 44 Fed. Reg. 32893 (1979). Therefore, expressions of an intent that "all" point sources meet BPT standards by 1977 do not necessarily support EPA's argument.

and could only be applied to BAT limitations. Similarly, the Senate Report on the Conference action emphasized that one of the purposes of the BPT limitation was to avoid imposing on the "Administrator any requirement . . . to determine the economic impact of controls on any individual plant in a single community." Leg. Hist. 170.

Nor did Congress restrict the reach of § 301 (c) without understanding the economic hardships that uniform standards would impose. Prior to passage of the Act, Congress had before it a report jointly prepared by EPA, the Commerce Department, and the Council on Environmental Quality on the impact of the pollution control measures on industry.[19] That report estimated that there would be 200 to 300 plant closings caused by the first set of pollution limitations. Comments in the Senate debate were explicit: "There is no doubt that we will suffer some disruptions in our economy because of our efforts; many marginal plants may be forced to close." Leg. Hist. 1282 (Sen. Bentsen).[20] The House managers explained the Conference position as follows:

> "If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge issued in the interim would reflect the fact that all discharges not in compliance with such 'best practicable technology currently available' would cease by June 30, 1977." *Id.*, at 231.

Congress did not respond to this foreseen economic impact by making room for variances based on economic impact. In fact, this possibility was specifically considered and rejected:

> "The alternative [to a loan program] would be waiving strict environmental standards where economic hardship

[19] U. S. Council on Environmental Quality, Dept. of Commerce, & EPA, The Economic Impact of Pollution Control (Mar. 1972). See Leg. Hist. 156, 523.

[20] See also remarks quoted in n. 22, *infra*.

> could be shown. But the approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the filmsiest [*sic*] of pretenses that they become meaningless. In short, with variances, exceptions to pollution cleanup can become the rule, meaning further tragic delay in stopping the destruction of our environment." *Id.*, at 1355 (Sen. Nelson).

Instead of economic variances, Congress specifically added two other provisions to address the problem of economic hardship.

First, provision was made for low-cost loans to small businesses to help them meet the cost of technological improvements. 86 Stat. 898, amending § 7 of the Small Business Act, 15 U. S. C. § 636. The Conference Report described the provision as authorizing the Small Business Administration "to make loans to assist small business concerns . . . if the Administrator determines that the concern is likely to suffer substantial economic injury without such assistance." Leg. Hist. 153. Senator Nelson, who offered the amendment providing for these loans, saw the loans as an alternative to the dangers of an economic variance provision that he felt might otherwise be necessary.[21] Several Congressmen understood the loan program as an alternative to forced closings: "It is the smaller business that is hit hardest by these laws and their enforcement. And it is that same class of business that has the least resources to meet the demands of this enforcement. . . . Without assistance, many of these businesses may face extinction." *Id.*, at 1359 (Sen. McIntyre).[22]

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[21] See quotation above.

[22] Similar remarks were made by Representative Harrington ("No one in Congress wishes to legislate so irresponsibly that we drive out of

Second, an employee protection provision was added, giving EPA authority to investigate any plant's claim that it must cut back production or close down because of pollution control regulations. § 507 (e), 86 Stat. 890, 33 U. S. C. § 1367 (e).[23] This provision had two purposes: to allow EPA constantly to monitor the economic effect on industry of pollution control rules and to undercut economic threats by industry that would create pressure to relax effluent limitation rules.[24] Representative Fraser explained this second purpose as follows:

"[T]he purpose of the amendment is to provide for a public hearing in the case of an industry claim that

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business those who sincerely wish to abide by the new pollution laws but who, because of a bad state of the economy, will be forced to close. The $800 million authorized by this section may not be completely adequate. But it is a start," Leg. Hist. 450).

[23] Section 507 (e) provides in pertinent part: "The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order. Any employee who is discharged or laid-off, threatened with discharge or lay-off . . . because of the alleged results of any effluent limitation or order issued under this chapter . . . may request the Administrator to conduct a full investigation of the matter. . . . [T]he Administrator shall make findings of fact as to the effect of such effluent limitation or order on employment and on the alleged discharge, layoff, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public." 33 U. S. C. § 1367 (e).

[24] See Leg. Hist. 654–659. Representative Abzug emphasized the first purpose of the provision: "This amendment will allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects." *Id.*, at 658. Representative Miller noted that "some economic hardship, especially in smaller communities who rely on single, older plants, may result from the requirements of the pending bill," but opposed this provision because he thought that economic hardships caused by the Act should be addressed systematically by modifying the Economic Development Act. *Ibid.*

> enforcement of these water-control standards will force it to relocate or otherwise shut down operations. . . . I think too many companies use the excuse of compliance, or the need for compliance, to change operations that are going to change anyway. It is this kind of action that gives the whole antipollution effort a bad name and causes a great deal of stress and strain in the community." Leg. Hist. 659.

The only protection offered by the provision, however, is the assurance that there will be a public inquiry into the facts behind such an economic threat. The section specifically concludes that "[n]othing in this subsection shall be construed to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this chapter." § 507 (e), 33 U. S. C. § 1367 (e).

As we see it, Congress anticipated that the 1977 regulations would cause economic hardship and plant closings: "[T]he question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations." *Du Pont*, 430 U. S., at 138.

IV

It is by now a commonplace that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).[25] The statute itself does not provide

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[25] Respondents contend that deference to agency interpretation is not appropriate in this case because EPA has not consistently interpreted the BPT variance requirements. However, in only one instance has EPA stated that it would consider economic capability in relation to BPT variance applications. 43 Fed. Reg. 44846–44848 (1978). This was in response to the Court of Appeals decision in *Appalachian Power Co.* v. *Train*, 545 F. 2d 1351 (CA4 1976), and EPA specifically limited this change to steam electric power generating plants, which were the subject of the court's order.

for BPT variances in connection with permits for individual point sources, and we had no occasion in *Du Pont* to address the adequacy of the Administrator's 1977 variance provision. In the face of § 301 (c)'s explicit limitation and in the absence of any other specific direction to provide for variances in connection with permits for individual point sources, we believe that the Administrator has adopted a reasonable construction of the statutory mandate.

In rejecting EPA's interpretation of the BPT variance provision, the Court of Appeals relied on a mistaken conception of the relation between BPT and BAT standards. The court erroneously believed that since BAT limitations are to be more stringent than BPT limitations, the variance provision for the latter must be at least as flexible as that for the former with respect to affordability.[26] The variances permitted by § 301 (c) from the 1987 limitations, however, can reasonably be understood to represent a cost in decreased effluent reductions that can only be afforded once the minimal standard expressed in the BPT limitation has been reached.[27]

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[26] This argument appears in *Appalachian Power, supra,* at 1359, which the Court of Appeals relies upon in *Crushed Stone.* 601 F. 2d, at 123.

The Court of Appeals also believed that because there will be situations in which the BPT and the BAT standards are identical, see Development Document for Mineral Mining, *supra* n. 15, at 438, it would be illogical to allow a variance based on economic capability for the latter but not for the former. The result would be to "close a plant in 1979 which would be allowed to operate under a variance in 1983." 601 F. 2d, at 124. This assumes, however, that a variance would be available even though BPT standards had not been met, an assumption which EPA rejects, Brief for Petitioners 27, and which is questionable in light of the legislative history. Leg. Hist. 232 ("This provision [§ 301 (c)] is not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of 'best practicable control technology.'" (Rep. Jones, chairman of the House Conferees)). The suggested contradiction is accordingly unlikely to appear. In any event, it is of minor significance in considering the facial validity of the 1977 variance provisions.

[27] We find no support for respondents' contention that Congress implicitly approved the Court of Appeals' reading of the variance provision,

We conclude, therefore, that the Court of Appeals erred in not accepting EPA's interpretation of the Act. EPA is not required by the Act to consider economic capability in granting variances from its uniform BPT regulations.

The judgments of the Court of Appeals are

Reversed.

JUSTICE POWELL took no part in the consideration or decision of these cases.

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when it considered and passed the 1977 amendments to the Act. Respondents rely primarily on the discussion of *Appalachian Power* in a document prepared by the Library of Congress for the House Committee on Public Works and Transportation, Case Law Under the FWPCA Amendments of 1972 (Comm. Print 1977). However, that document notes that there was at that time a conflict in the United States Courts of Appeals over the validity of the variance provision and in no way indicates that the *Appalachian Power* decision was the correct interpretation. *Id.*, at 28.

PACILEO, SHERIFF *v.* WALKER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 79-2040. Decided December 8, 1980

Respondent, who had escaped from the Arkansas Department of Corrections, was apprehended in California and was served with a warrant of arrest and rendition issued by the Governor of California pursuant to the Governor of Arkansas' request for extradition. Respondent thereafter challenged the issuance of the warrant in both state and federal courts. Ultimately, the California Supreme Court issued a writ of habeas corpus directing a California trial court to conduct an inquiry as to whether the Arkansas penitentiary in which respondent would be confined was presently operated in conformance with the Eighth Amendment of the Federal Constitution.

Held: The Extradition Clause, Art. IV, § 2, cl. 2, and its implementing statute, 18 U. S. C. § 3182, do not give the courts of the "asylum" or "sending" State authority to inquire into the prison conditions of the "demanding" State. Once the Governor of California issued the warrant, claims as to constitutional defects in the Arkansas penal system should be heard in the courts of Arkansas, not those of California.

Certiorari granted; reversed and remanded.

PER CURIAM.

The United States Constitution provides that "[a] person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Art. IV, § 2, cl. 2.

In this case, there is no dispute as to the facts necessary to resolve the legal question presented. In 1975, respondent James Dean Walker escaped from the Arkansas Department of Corrections and remained at large until he was apprehended in California in 1979. In December 1979, the Governor of Arkansas requested the arrest and rendition of respondent, alleging that respondent was a fugitive from

justice. In February 1980, the Governor of California honored the request of the Governor of Arkansas and duly issued a warrant of arrest and rendition. This warrant was then served upon respondent by the Sheriff of El Dorado County, Cal. Respondent thereafter challenged the Governor's issuance of the warrant in both state and federal courts. He was unsuccessful until he reached the Supreme Court of California, which, on April 9, 1980, issued a writ of habeas corpus directing the Superior Court of El Dorado County to "conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter to decide the petition on its merits."

Petitioner Sheriff contends that Art. IV, § 2, cl. 2, and its implementing statute, 18 U. S. C. § 3182, do not give the courts of the "asylum" or "sending" State authority to inquire into the prison conditions of the "demanding" State. We agree. In *Michigan* v. *Doran*, 439 U. S. 282 (1978), our most recent pronouncement on the subject, we stated that "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution." *Id.*, at 288. We further stated:

> "A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." *Id.*, at 289.

In *Sweeney* v. *Woodall*, 344 U. S. 86 (1952), this Court held that a fugitive from Alabama could not raise in the federal courts of Ohio, the asylum State, the constitutionality of his confinement in Alabama. We stated:

> "Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available, and where suitable relief, if any is necessary, may be fashioned." *Id.*, at 90.

We think that the Supreme Court of California ignored the teachings of these cases when it directed one of its own trial courts of general jurisdiction to conduct an inquiry into the present conditions of the Arkansas penal system. Once the Governor of California issued the warrant for arrest and rendition in response to the request of the Governor of Arkansas, claims as to constitutional defects in the Arkansas penal system should be heard in the courts of Arkansas, not those of California. "To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Art. IV, § 2." *Michigan* v. *Doran*, *supra*, at 290.

The petition for certiorari is granted, the judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE MARSHALL, dissenting.

Because *Michigan* v. *Doran*, 439 U. S. 282 (1978), did not involve a claimed violation of the Eighth Amendment, and

because *Sweeney* v. *Woodall*, 344 U. S. 86 (1952), did not involve a state court's decision to grant state habeas corpus relief, I do not believe that they control the question raised here, and I would set the case for plenary review.

ALLEN ET AL. *v.* McCURRY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-935. Argued October 8, 1980—Decided December 9, 1980

At a hearing before respondent's criminal trial, a Missouri court denied, in part, respondent's motion to suppress, on Fourth and Fourteenth Amendment grounds, certain evidence that had been seized by the police. Respondent was subsequently convicted, and the conviction was affirmed on appeal. Because he did not assert that the state courts had denied him a "full and fair opportunity" to litigate his search-and-seizure claim, respondent was barred by *Stone* v. *Powell*, 428 U. S. 465, from seeking a writ of habeas corpus in a federal district court. Nevertheless, he sought federal-court redress for the alleged constitutional violation by bringing a suit for damages under 42 U. S. C. § 1983 against the officers who had seized the evidence in question. The Federal District Court granted summary judgment for the defendants, holding that collateral estoppel prevented respondent from relitigating the search-and-seizure question already decided against him in the state courts. The Court of Appeals reversed and remanded, noting that *Stone* v. *Powell*, *supra*, barred respondent from federal habeas corpus relief and that the § 1983 suit was, therefore, respondent's only route to a federal forum for his constitutional claim, and directed the trial court to allow him to proceed to trial unencumbered by collateral estoppel.

Held: The Court of Appeals erred in holding that respondent's inability to obtain federal habeas corpus relief upon his Fourth Amendment claim renders the doctrine of collateral estoppel inapplicable to his § 1983 suit. Nothing in the language or legislative history of § 1983 discloses any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. Nor does anything in § 1983's legislative history reveal any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings. Pp. 94-105.

606 F. 2d 795, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN,

J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 105.

John J. FitzGibbon argued the cause for petitioners. With him on the briefs were *Eugene P. Freeman* and *Robert H. Dierker, Jr.*

Jeffrey J. Shank argued the cause and filed a brief for respondent.*

JUSTICE STEWART delivered the opinion of the Court.

At a hearing before his criminal trial in a Missouri court, the respondent, Willie McCurry, invoked the Fourth and Fourteenth Amendments to suppress evidence that had been seized by the police. The trial court denied the suppression motion in part, and McCurry was subsequently convicted after a jury trial. The conviction was later affirmed on appeal. *State* v. *McCurry*, 587 S. W. 2d 337 (Mo. App. 1979). Because he did not assert that the state courts had denied him a "full and fair opportunity" to litigate his search and seizure claim, McCurry was barred by this Court's decision in *Stone* v. *Powell*, 428 U. S. 465, from seeking a writ of habeas corpus in a federal district court. Nevertheless, he sought federal-court redress for the alleged constitutional violation by bringing a damages suit under 42 U. S. C. § 1983 against the officers who had entered his home and seized the evidence in question. We granted certiorari to consider whether the unavailability of federal habeas corpus prevented the police officers from raising the state courts' partial rejection of McCurry's constitutional claim as a collateral estoppel defense to the § 1983 suit against them for damages. 444 U. S. 1070.

**Stephen H. Sachs*, Attorney General of Maryland, *Emory A. Plitt, Jr.*, Assistant Attorney General, *George P. Agnost, Fred E. Inbau, Wayne W. Schmidt*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., et al., as *amici curiae* urging reversal.

Michael A. Wolff filed a brief for the American Civil Liberties Union of Eastern Missouri as *amicus curiae*.

I

In April 1977, several undercover police officers, following an informant's tip that McCurry was dealing in heroin, went to his house in St. Louis, Mo., to attempt a purchase.[1] Two officers, petitioners Allen and Jacobsmeyer, knocked on the front door, while the other officers hid nearby. When McCurry opened the door, the two officers asked to buy some heroin "caps." McCurry went back into the house and returned soon thereafter, firing a pistol at and seriously wounding Allen and Jacobsmeyer. After a gun battle with the other officers and their reinforcements, McCurry retreated into the house; he emerged again when the police demanded that he surrender. Several officers then entered the house without a warrant, purportedly to search for other persons inside. One of the officers seized drugs and other contraband that lay in plain view, as well as additional contraband he found in dresser drawers and in auto tires on the porch.

McCurry was charged with possession of heroin and assault with intent to kill. At the pretrial suppression hearing, the trial judge excluded the evidence seized from the dresser drawers and tires, but denied suppression of the evidence found in plain view. McCurry was convicted of both the heroin and assault offenses.

McCurry subsequently filed the present § 1983 action for $1 million in damages against petitioners Allen and Jacobsmeyer, other unnamed individual police officers, and the city of St. Louis and its police department. The complaint alleged a conspiracy to violate McCurry's Fourth Amendment rights, an unconstitutional search and seizure of his house, and an assault on him by unknown police officers after he had been arrested and handcuffed. The petitioners moved for summary judgment. The District Court apparently under-

[1] The facts are drawn from the Court of Appeals' opinion. 606 F. 2d 795 (CA8 1979).

stood the gist of the complaint to be the allegedly unconstitutional search and seizure and granted summary judgment, holding that collateral estoppel prevented McCurry from relitigating the search-and-seizure question already decided against him in the state courts. 466 F. Supp. 514 (ED Mo. 1978).[2]

The Court of Appeals reversed the judgment and remanded the case for trial. 606 F. 2d 795 (CA8 1979).[3] The appellate court said it was not holding that collateral estoppel was generally inapplicable in a § 1983 suit raising issues determined against the federal plaintiff in a state criminal trial. *Id.*, at 798. But noting that *Stone* v. *Powell, supra,* barred McCurry from federal habeas corpus relief, and invoking "the special role of the federal courts in protecting civil rights," 606 F. 2d, at 799, the court concluded that the § 1983 suit was McCurry's only route to a federal forum for his

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[2] The merits of the Fourth Amendment claim are discussed in the opinion of the Missouri Court of Appeals. *State* v. *McCurry,* 587 S. W. 2d 337 (1979). The state courts upheld the entry of the house as a reasonable response to emergency circumstances, but held illegal the seizure of any evidence discovered as a result of that entry except what was in plain view. *Id.*, at 340. McCurry therefore argues here that even if the doctrine of collateral estoppel generally applies to this case, he should be able to proceed to trial to obtain damages for the part of the seizure declared illegal by the state courts. The petitioners contend, on the other hand, that the complaint alleged essentially an illegal entry, adding that only the entry could possibly justify the $1 million prayer. Since the state courts upheld the entry, the petitioners argue that if collateral estoppel applies here at all, it removes from trial all issues except the alleged assault. The United States Court of Appeals, however, addressed only the broad question of the applicability of collateral estoppel to § 1983 suits brought by plaintiffs in McCurry's circumstances, and questions as to the scope of collateral estoppel with respect to the particular issues in this case are not now before us.

[3] Beyond holding that collateral estoppel does not apply in this case, the Court of Appeals noted that the District Court had overlooked the conspiracy and assault charges. 606 F. 2d, at 797, and n. 1.

constitutional claim and directed the trial court to allow him to proceed to trial unencumbered by collateral estoppel.[4]

II

The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana* v. *United States*, 440 U. S. 147, 153.[5] As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*, at 153–154.

In recent years, this Court has reaffirmed the benefits of collateral estoppel in particular, finding the policies underlying it to apply in contexts not formerly recognized at common law. Thus, the Court has eliminated the requirement of mutuality in applying collateral estoppel to bar relitiga-

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[4] Nevertheless, relying on the doctrine of *Younger* v. *Harris*, 401 U. S. 37, the Court of Appeals directed the District Court to abstain from conducting the trial until McCurry had exhausted his opportunities for review of his claim in the state appellate courts. 606 F. 2d, at 799.

[5] The Restatement of Judgments now speaks of res judicata as "claim preclusion" and collateral estoppel as "issue preclusion." Restatement (Second) of Judgments § 74 (Tent. Draft No. 3, Apr. 15, 1976). Some courts and commentators use "res judicata" as generally meaning both forms of preclusion.

Contrary to a suggestion in the dissenting opinion, *post*, at 113, n. 12, this case does not involve the question whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation.

tion of issues decided earlier in federal-court suits, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, and has allowed a litigant who was not a party to a federal case to use collateral estoppel "offensively" in a new federal suit against the party who lost on the decided issue in the first case, *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322.[6] But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. *Montana* v. *United States*, *supra*, at 153; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, *supra*, at 328–329.[7]

The federal courts generally have also consistently accorded preclusive effect to issues decided by state courts. *E. g.*, *Montana* v. *United States*, *supra*; *Angel* v. *Bullington*, 330 U. S. 183. Thus, res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on ad-

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[6] In *Blonder-Tongue* the Court noted other trends in the state and federal courts expanding the preclusive effects of judgments, such as the broadened definition of "claim" in the context of res judicata and the greater preclusive effect given criminal judgments in subsequent civil cases. 402 U. S., at 326.

[7] Other factors, of course, may require an exception to the normal rules of collateral estoppel in particular cases. *E. g.*, *Montana* v. *United States*, 440 U. S., at 162 (unmixed questions of law in successive actions between the same parties on unrelated claims).

Contrary to the suggestion of the dissent, *post*, at 112–113, our decision today does not "fashion" any new, more stringent doctrine of collateral estoppel, nor does it hold that the collateral-estoppel effect of a state-court decision turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate a federal question. Our decision does not "fashion" any doctrine of collateral estoppel at all. Rather, it construes § 1983 to determine whether the conventional doctrine of collateral estoppel applies to the case at hand. It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral-estoppel defense in this case is not before us. See n. 2, *supra*.

judication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system. See *Younger* v. *Harris*, 401 U. S. 37, 43–45.

Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so:

> "[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . ." 28 U. S. C. § 1738.[8]

Huron Holding Corp. v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193; *Davis* v. *Davis*, 305 U. S. 32, 40. It is against this background that we examine the relationship of § 1983 and collateral estoppel, and the decision of the Court of Appeals in this case.

III

This Court has never directly decided whether the rules of res judicata and collateral estoppel are generally applicable to § 1983 actions. But in *Preiser* v. *Rodriguez*, 411 U. S. 475, 497, the Court noted with implicit approval the view of other federal courts that res judicata principles fully apply to civil rights suits brought under that statute. See also *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 606, n. 18; *Wolff* v.

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[8] This statute has existed in essentially unchanged form since its enactment just after the ratification of the Constitution, Act of May 26, 1790, ch. 11, 1 Stat. 122, and its re-enactment soon thereafter, Act of Mar. 27, 1804, ch. 56, 2 Stat. 298–299. Congress has also provided means for authenticating the records of the state proceedings to which the federal courts are to give full faith and credit. 28 U. S. C. § 1738.

McDonnell, 418 U. S. 539, 554, n. 12.[9] And the virtually unanimous view of the Courts of Appeals since *Preiser* has been that § 1983 presents no categorical bar to the application of res judicata and collateral estoppel concepts.[10] These federal appellate court decisions have spoken with little explanation or citation in assuming the compatibility of § 1983 and rules of preclusion, but the statute and its legislative history clearly support the courts' decisions.

Because the requirement of mutuality of estoppel was still alive in the federal courts until well into this century, see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, *supra*, at 322–323, the drafters of the 1871 Civil Rights Act, of which § 1983 is a part, may have had less reason to concern themselves with rules of preclusion than a modern Congress would. Nevertheless, in 1871 res judicata and collateral estoppel could certainly have applied in federal suits following state-court litigation between the same parties or their privies, and nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express stat-

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[9] The cases noted in *Preiser* applied res judicata to issues decided both in state civil proceedings, *e. g.*, *Coogan* v. *Cincinnati Bar Assn.*, 431 F. 2d 1209, 1211 (CA6 1970), and state criminal proceedings, *e. g.*, *Goss* v. *Illinois*, 312 F. 2d 257, 259 (CA7 1963).

[10] *E. g.*, *Robbins* v. *District Court*, 592 F. 2d 1015 (CA8 1979); *Jennings* v. *Caddo Parish School Bd.*, 531 F. 2d 1331 (CA5 1976); *Lovely* v. *Laliberte*, 498 F. 2d 1261 (CA1 1974); *Brown* v. *Georgia Power Co.*, 491 F. 2d 117 (CA5 1974); *Tang* v. *Appellate Division*, 487 F. 2d 138 (CA2 1973).

A very few courts have suggested that the normal rules of claim preclusion should not apply in § 1983 suits in one peculiar circumstance: Where a § 1983 plaintiff seeks to litigate in federal court a federal issue which he could have raised but did not raise in an earlier state-court suit against the same adverse party. *Graves* v. *Olgiati*, 550 F. 2d 1327 (CA2 1977); *Lombard* v. *Board of Ed. of New York City*, 502 F. 2d 631 (CA2 1974); *Mack* v. *Florida Bd. of Dentistry*, 430 F. 2d 862 (CA5 1970). These cases present a narrow question not now before us, and we intimate no view as to whether they were correctly decided.

utory requirements of the predecessor of 28 U. S. C. § 1738, see n. 8, *supra*. Section 1983 creates a new federal cause of action.[11] It says nothing about the preclusive effect of state-court judgments.[12]

Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion. The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States, see *Monroe* v. *Pape*, 365 U. S. 167, 174, and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in

[11] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983.

It has been argued that, since there remains little federal common law after *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, to hold that the creation of a federal cause of action by itself does away with the rules of preclusion would take away almost all meaning from § 1738. Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 328 (1978).

[12] By contrast, the roughly contemporaneous statute extending the federal writ of habeas corpus to state prisoners expressly rendered "null and void" any state-court proceeding inconsistent with the decision of a federal habeas court, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386 (current version at 28 U. S. C. § 2254), and the modern habeas statute also expressly adverts to the effect of state-court criminal judgments by requiring the applicant for the writ to exhaust his state-court remedies, 28 U. S. C. § 2254 (b), and by presuming a state-court resolution of a factual issue to be correct except in eight specific circumstances, § 2254 (d). In any event, the traditional exception to res judicata for habeas corpus review, see *Preiser* v. *Rodriguez*, 411 U. S. 475, 497, provides no analogy to § 1983 cases, since that exception finds its source in the unique purpose of habeas corpus—to release the applicant for the writ from unlawful confinement. *Sanders* v. *United States*, 373 U. S. 1, 8.

protecting federal rights, *Mitchum* v. *Foster*, 407 U. S. 225, 241–242; *Monroe* v. *Pape, supra*, at 180.[13] But in the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored, *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

As the Court has understood the history of the legislation, Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts. See *Mitchum* v. *Foster, supra*, at 241. But in doing so, Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts. See *Monroe* v. *Pape, supra*, at 183 ("The federal remedy is supplementary to the state remedy . . ."). [14] The debates contain several references to the concurrent jurisdiction of the state courts over federal questions,[15] and numerous sugges-

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[13] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., 374-376 (1871) (Rep. Lowe); *id.*, at 394 (Rep. Rainey); *id.*, at 653 (Sen. Osborn).

[14] To the extent that Congress in the post-Civil War period did intend to deny full faith and credit to state-court decisions on constitutional issues, it expressly chose the very different means of postjudgment removal for state-court defendants whose civil rights were threatened by biased state courts and who therefore "are denied or cannot enforce [their civil rights] in the courts or judicial tribunals of the State." Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27.

[15] *E. g.*, Cong. Globe, 42d Cong., 1st Sess., 514 (1871) (Rep. Poland); *id.*, at 695 (Sen. Edmunds); see *Martinez* v. *California*, 444 U. S. 277, 283–284, n. 7 (noting that the state courts may entertain § 1983 claims, while reserving the question whether the state courts must do so).

tions that the state courts would retain their established jurisdiction so that they could, when the then current political passions abated, demonstrate a new sensitivity to federal rights.[16]

To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in *Monroe* v. *Pape*, *supra*, the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was

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[16] Senator Edmunds, the floor manager of the bill in the Senate, observed at the end of the debates:

"The bill, like all bills of this character, in its first and second sections, is a declaration of rights and a provision for the punishment of conspiracies against constitutional rights, and a redress for wrongs. It does not undertake to overthrow any court. . . . It does not undertake to interpose itself out of the regular order of the administration of law. It does not attempt to deprive any State of the honor which is due the punishment of crime. It is a law acting upon the citizen like every other law, and it is a law to be enforced by the courts through the regular and ordinary processes of judicial administration, and in no other way, until forcible resistance shall be offered to the quiet and ordinary course of justice." Cong. Globe, 42d Cong., 1st Sess., 697–698 (1871).

Representative Coburn expressed his belief that after passage of the Act "the tumbling and tottering States will spring up and resume the long-neglected administration of law in their own courts, giving, as they ought, themselves, equal protection to all." *Id.*, at 460. Representative Sheldon noted:

"Convenience and courtesy to the States suggest a sparing use [of national authority] and never so far as to supplant the State authority except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed on them. . . . It seems to me to be sufficient, and at the same time to be proper, to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution. . . ." *Id.*, at 368.

inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U. S., at 173–174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.*, at 176. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. See *supra*, at 95. But the Court's view of § 1983 in *Monroe* lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.[17]

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[17] The dissent suggests, *post*, at 112, that the Court's decision in *England* v. *Medical Examiners*, 375 U. S. 411, demonstrates the impropriety of affording preclusive effect to the state-court decision in this case. The *England* decision is inapposite to the question before us. In the *England* case, a party first submitted to a federal court his claim that a state statute violated his constitutional rights. The federal court abstained and remitted the plaintiff to the state courts, holding that a state-court decision that the statute did not apply to the plaintiff would moot the federal question. *Id.*, at 413. The plaintiff submitted both the state- and federal-law questions to the state courts, which decided both questions adversely to him. *Id.*, at 414. This Court held that in such a circumstance, a plaintiff who properly reserved the federal issue by informing the state courts of his intention to return to federal court, if necessary, was not precluded from litigating the federal question in federal court. The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-

The Court of Appeals in this case acknowledged that every Court of Appeals that has squarely decided the question has held that collateral estoppel applies when § 1983 plaintiffs attempt to relitigate in federal court issues decided against them in state criminal proceedings.[18] But the court noted that the only two federal appellate decisions invoking collateral estoppel to bar relitigation of Fourth Amendment claims decided adversely to the § 1983 plaintiffs in state courts came before this Court's decision in *Stone* v. *Powell*, 428 U. S. 465.[19] It also noted that some of the decisions hold-

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court jurisdiciton in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. *Id.*, at 415. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law. *Id.*, at 416, and n. 7. These concerns have no bearing whatsoever on the present case.

[18] *E. g.*, *Fernandez* v. *Trias Monge*, 586 F. 2d 848, 854 (CA1 1978); *Wiggins* v. *Murphy*, 576 F. 2d 572, 573 (CA4 1978); *Martin* v. *Delcambre*, 578 F. 2d 1164, 1165 (CA5 1978); *Winters* v. *Lavine*, 574 F. 2d 46, 58 (CA2 1978); *Metros* v. *United States District Court*, 441 F. 2d 313 (CA10 1971); *Kauffman* v. *Moss*, 420 F. 2d 1270, 1274 (CA3 1970); *Mulligan* v. *Schlachter*, 389 F. 2d 231, 233 (CA6 1968).

Dictum in *Ney* v. *California*, 439 F. 2d 1285, 1288 (CA9 1971), suggested that applying collateral estoppel in § 1983 actions might make the Civil Rights Act "a dead letter," but in that case, because the state prosecutor had agreed to withdraw the evidence allegedly seized in violation of the Fourth Amendment, the state court had never decided the constitutional claim. In *Brubaker* v. *King*, 505 F. 2d 534, 537–538 (1974), the Court of Appeals for the Seventh Circuit held that since the issues in the state and federal cases were different—the legality of police conduct in the former and the good faith of the police in the latter—the state decision could not have preclusive effect in the federal court. This solution, however, fails to recognize that a state-court decision that the police acted legally cannot but foreclose a claim that they acted in bad faith. At least one Federal District Court has relied on the *Brubaker* case. *Clark* v. *Lutcher*, 436 F. Supp. 1266 (MD Pa. 1977).

[19] *Metros* v. *United States District Court*, *supra*; *Mulligan* v. *Schlachter*, *supra*.

ing collateral estoppel applicable to § 1983 actions were based at least in part on the estopped party's access to another federal forum through habeas corpus.[20] The Court of Appeals thus concluded that since *Stone* v. *Powell* had removed McCurry's right to a hearing of his Fourth Amendment claim in federal habeas corpus, collateral estoppel should not deprive him of a federal judicial hearing of that claim in a § 1983 suit.

Stone v. *Powell* does not provide a logical doctrinal source for the court's ruling. This Court in *Stone* assessed the costs and benefits of the judge-made exclusionary rule within the boundaries of the federal courts' statutory power to issue writs of habeas corpus, and decided that the incremental deterrent effect that the issuance of the writ in Fourth Amendment cases might have on police conduct did not justify the cost the writ imposed upon the fair administration of criminal justice. 428 U. S., at 489–496. The *Stone* decision concerns only the prudent exercise of federal-court jurisdiction under 28 U. S. C. § 2254. It has no bearing on § 1983 suits or on the question of the preclusive effect of state-court judgments.

The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress.[21] And no such authority is to be found in § 1983 itself. For reasons already discussed at length, nothing in the language or legislative history of

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[20] *E. g., Rimmer* v. *Fayetteville Police Department*, 567 F. 2d 273, 276 (CA4 1977); *Thistlewaite* v. *City of New York*, 497 F. 2d 339, 343 (CA2 1973); *Alexander* v. *Emerson*, 489 F. 2d 285, 286 (CA5 1973).

[21] U. S. Const., Art. III.

§ 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. And nothing in the legislative history of § 1983 reveals any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings.[22] There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.[23]

Through § 1983, the 42d Congress intended to afford an opportunity for legal and equitable relief in a federal court for certain types of injuries. It is difficult to believe that the drafters of that Act considered it a substitute for a federal writ of habeas corpus, the purpose of which is not to redress civil injury, but to release the applicant from unlawful physical confinement, *Preiser* v. *Rodriguez*, 411 U. S., at 484; *Fay* v. *Noia*, 372 U. S. 391, 399, n. 5,[24] particularly in light of the

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[22] The remarks of the proponents of § 1983 quoted in n. 16, *supra*, suggest the contrary. The Court of Appeals did not in any degree rest its holding on disagreement with the common view that judgments in criminal proceedings as well as in civil proceedings are entitled to preclusive effect. See, *e. g.*, *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558.

[23] The Court of Appeals did not suggest that the prospect of collateral estoppel in a § 1983 suit would deter a defendant in a state criminal case from raising Fourth Amendment claims, and it is difficult to imagine a defendant risking conviction and imprisonment because he hoped to win a later civil judgment based upon an allegedly illegal search and seizure.

[24] Under the modern statute, federal habeas corpus is bounded by a requirement of exhaustion of state remedies and by special procedural rules, 28 U. S. C. § 2254, which have no counterparts in § 1983, and which therefore demonstrate the continuing illogic of treating federal habeas and § 1983 suits as fungible remedies for constitutional violations.

extremely narrow scope of federal habeas relief for state prisoners in 1871.

The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that *Stone* v. *Powell* provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so. 428 U. S., at 493–494, n. 35; see *Robb* v. *Connolly*, 111 U. S. 624, 637 (Harlan, J.).

The Court of Appeals erred in holding that McCurry's inability to obtain federal habeas corpus relief upon his Fourth Amendment claim renders the doctrine of collateral estoppel inapplicable to his § 1983 suit.[25] Accordingly, the judgment is reversed, and the case is remanded to the Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The legal principles with which the Court is concerned in this civil case obviously far transcend the ugly facts of respondent's criminal convictions in the courts of Missouri for heroin possession and assault.

The Court today holds that notions of collateral estoppel apply with full force to this suit brought under 42 U. S. C. § 1983. In my view, the Court, in so ruling, ignores the clear import of the legislative history of that statute and disregards the important federal policies that underlie its

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[25] We do not decide *how* the body of collateral-estoppel doctrine or 28 U. S. C. § 1738 should apply in this case. See n. 2, *supra*.

enforcement. It also shows itself insensitive both to the significant differences between the § 1983 remedy and the exclusionary rule, and to the pressures upon a criminal defendant that make a free choice of forum illusory. I do not doubt that principles of preclusion are to be given such effect as is appropriate in a § 1983 action. In many cases, the denial of res judicata or collateral estoppel effect would serve no purpose and would harm relations between federal and state tribunals. Nonetheless, the Court's analysis in this particular case is unacceptable to me. It works injustice on this § 1983 plaintiff, and it makes more difficult the consistent protection of constitutional rights, a consideration that was at the core of the enacters' intent. Accordingly, I dissent.

In deciding whether a common-law doctrine is to apply to § 1983 when the statute itself is silent, prior cases uniformly have accorded the intent of the legislators great weight.[1] For example, in reference to the judicially created immunity doctrine, the Court has observed that when the "immunity claimed . . . was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity." *Owen* v. *City of Independence*, 445 U. S. 622, 638 (1980).[2] This very proper inquiry must be made in order to ensure that § 1983 will continue to serve the important goals intended for it by the 42d Congress. In the present case, however, the Court minimizes the significance of the legislative history and discounts its own prior explicit interpretations of the statute. Its discussion is limited to articulating what it terms the single fundamental principle of res judicata and collateral estoppel.

[1] See, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1 (1980); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

[2] See also *Robertson* v. *Wegmann*, 436 U. S. 584 (1978) (survival of action); *Carey* v. *Piphus*, 435 U. S. 247 (1978) (nature of damages award).

Respondent's position merits a quite different analysis. Although the legislators of the 42d Congress did not expressly state whether the then existing common-law doctrine of preclusion would survive enactment of § 1983, they plainly anticipated more than the creation of a federal statutory remedy to be administered indifferently by either a state or a federal court.[3] The legislative intent, as expressed by supporters[4] and understood by opponents,[5] was to restructure relations

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[3] Senator Osborn's remarks of April 13, 1871, illustrate the contemporary understanding:

"That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should [enact protective legislation]. . . .

"The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; *i. e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." Cong. Globe, 42d Cong., 1st Sess., 653.

[4] See, *e. g.*, *id.*, at 460 (remarks of Rep. Coburn, whom the Court by its reference to the Congressman's "spring up and resume" observation, *ante*, at 100, n. 16, would interpret the other way) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . . We believe that we can trust our United States courts, and we propose to do so"); Cong. Globe, 42d Cong., 1st Sess., App., at 79 (comments of Rep. Perry) ("The first section provides redress by civil action *in the Federal courts* for a deprivation of any rights, privileges, and immunities secured by the Constitution . . .") (emphasis added).

[5] *Id.*, at 396 (comments of Rep. Rice) ("[The bill] is but a bold and dangerous assertion of both the power and the duty of the Federal Gov-

between the state and federal courts.[6] Congress deliberately opened the federal courts to individual citizens in response to the States' failure to provide justice in their own courts. Contrary to the view presently expressed by the Court, the 42d Congress was not concerned solely with procedural regularity. Even where there was procedural regularity, which the Court today so stresses, Congress believed that substantive justice was unobtainable.[7] The availability of the federal

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ernment to intervene in the internal affairs and police regulations of the States and to suspend the exercise of their rightful authority. . . . It is at war with the spirit of a republican Government"); *id.*, at 416 (comments of Rep. Biggs) ("[If this bill should pass] we have by law done what has never before been done in our history, whatever the provocation, namely: authorized the punishment of crimes and offenses of a personal character among us under the Federal tribunals, which shall be of equal authority in criminal cases with our own State courts, and in many cases shall be of superior authority, and of an altogether extraordinary character[.] First, for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding"); *id.*, App., at 86 (comments of Rep. Storm) ("Now these questions could all be tried, I take it, in the State courts, and by a writ of error, as provided by the twenty-fifth section of the act of 1789, could be brought before the Supreme Court for review. . . . But the first section of this bill does not allow that right. It takes the whole question away at once and forever; and I say that on the ground of delay it is objectionable"). See also *id.*, at 686–687 (comments of Sen. Schurz); *id.*, App., at 216 (comments of Sen. Thurman).

[6] See *id.*, App., at 149 (comments of Rep. Garfield) (stating that Congress, in considering this legislation, must seek equipoise between opposing poles of government, on the one hand, "that despotism which shallows and absorbs all power in a single-central, government," and, on the other, the "extreme doctrine of local sovereignty which makes nationality impossible").

[7] See *id.*, App., at 78 (comments of Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dan-

forum was not meant to turn on whether, in an individual case, the state procedures were adequate. Assessing the state of affairs as a whole, Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights.

That the new federal jurisdiction was conceived of as concurrent with state jurisdiction does not alter the significance of Congress' opening the federal courts to these claims. Congress consciously acted in the broadest possible manner.[8] The legislators perceived that justice was not being done in

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gerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished"); *id.*, at 653 (comments of Sen. Osborn) ("The State courts, mainly under the influence of this [Klan] oath, are utterly powerless"); *id.*, at 394 (remarks of Rep. Rainey) ("The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"); *id.*, App., at 153 (comments of Rep. Garfield) ("But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them"); *id.*, App., at 166–167 (comments of Rep. Williams regarding Klan methods of securing perjured testimony).

[8] Representative Shellabarger, the bill's sponsor, stated:

"This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Id.*, App., at 68.

the States then dominated by the Klan, and it seems senseless to suppose that they would have intended the federal courts to give full preclusive effect to prior state adjudications. That supposition would contradict their obvious aim to right the wrongs perpetuated in those same courts.

I appreciate that the legislative history is capable of alternative interpretations. See the Court's opinion, *ante*, at 98–101. I would have thought, however, that our prior decisions made very clear which reading is required. The Court repeatedly has recognized that § 1983 embodies a strong congressional policy in favor of federal courts' acting as the primary and final arbiters of constitutional rights.[9] In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court held that Congress passed the legislation in order to substitute a federal forum for the ineffective, although plainly available, state remedies:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.*, at 180.[10]

The Court appears to me to misconstrue the plain meaning of *Monroe*. It states that in that case "the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow

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[9] *E. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

[10] To the extent that *Monroe* v. *Pape* held that a municipality was not a "person" within the meaning of § 1983, it was overruled by the Court in *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 664–689. That ruling, of course, does not affect *Monroe*'s authoritative pronouncement of the legislative purposes of § 1983.

full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice." *Ante*, at 100–101. It is true that the Court in *Monroe* described those three circumstances as the "three main aims" of the legislation. 365 U. S., at 173. Yet in that case, the Court's recounting of the legislative history and its articulation of these three purposes were intended only as illustrative of *why* the 42d Congress chose to establish a federal remedy in federal court, not as a delineation of *when* the remedy would be available. The Court's conclusion was that this remedy was to be available no matter what the circumstances of state law:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." *Id.*, at 183.

In *Mitchum* v. *Foster*, 407 U. S. 225 (1972), the Court reiterated its understanding of the effect of § 1983 upon state and federal relations:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex parte Virginia*, 100 U. S., at 346." *Id.*, at 242.[11]

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[11] The Court also stated:

"This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation

At the very least, it is inconsistent now to narrow, if not repudiate, the meaning of *Monroe* and *Mitchum* and to alter our prior understanding of the distribution of power between the state and federal courts.

One should note also that in *England* v. *Medical Examiners*, 375 U. S. 411 (1964), the Court had affirmed the federal courts' special role in protecting constitutional rights under § 1983. In that case it held that a plaintiff required by the abstention doctrine to submit his constitutional claim first to a state court could not be precluded entirely from having the federal court, in which he initially had sought relief, pass on his constitutional claim. The Court relied on "the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts," and on its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *Id.*, at 415. The Court set out its understanding as to when a litigant in a § 1983 case might be precluded by prior litigation, holding that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court." *Id.*, at 419. I do not understand why the Court today should abandon this approach.

The Court now fashions a new doctrine of preclusion, applicable only to actions brought under § 1983, that is more

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with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." 407 U. S., at 242.

strict and more confining than the federal rules of preclusion applied in other cases. In *Montana* v. *United States*, 440 U. S. 147 (1979), the Court pronounced three major factors to be considered in determining whether collateral estoppel serves as a barrier in the federal court:

> "[W]hether the issues presented . . . are in substance the same . . . ; whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion." *Id.*, at 155.

But now the Court states that the collateral-estoppel effect of prior state adjudication should turn on only one factor, namely, what it considers the "one general limitation" inherent in the doctrine of preclusion: "that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Ante*, at 95, 101. If that one factor is present, the Court asserts, the litigant properly should be barred from relitigating the issue in federal court.[12] One cannot deny that this factor is an important one. I do not believe, however, that the doctrine of preclusion requires the inquiry to be so narrow,[13] and my understanding of the policies underlying § 1983 would lead me to consider all relevant factors in each case before concluding that preclusion was warranted.

In this case, the police officers seek to prevent a criminal defendant from relitigating the constitutionality of their conduct in searching his house, after the state trial court had

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[12] This articulation of the preclusion doctrine of course would bar a § 1983 litigant from relitigating any issue he *might* have raised, as well as any issue he actually litigated in his criminal trial.

[13] See Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 4, Apr. 15, 1977); F. James & G. Hazard, Civil Procedure §§ 11.16–11.22 (2d ed. 1977).

found that conduct in part violative of the defendant's Fourth Amendment rights and in part justified by the circumstances. I doubt that the police officers, now defendants in this § 1983 action, can be considered to have been in privity with the State in its role as prosecutor. Therefore, only "issue preclusion" [14] is at stake.

The following factors persuade me to conclude that this respondent should not be precluded from asserting his claim in federal court. First, at the time § 1983 was passed, a nonparty's ability, as a practical matter, to invoke collateral estoppel was nonexistent. One could not preclude an opponent from relitigating an issue in a new cause of action, though that issue had been determined conclusively in a prior proceeding, unless there was "mutuality." [15] Additionally, the definitions of "cause of action" and "issue" were narrow.[16] As a result, and obviously, no preclusive effect could arise out of a criminal proceeding that would affect subsequent *civil* litigation. Thus, the 42d Congress could not have anticipated or approved that a criminal defendant, tried and con-

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[14] See *Cromwell* v. *County of Sac*, 94 U. S. 351 (1877); F. James & G. Hazard, Civil Procedure §§ 11.3, 11.16 (2d ed. 1977);.

[15] *Triplett* v. *Lowell*, 297 U. S. 638 (1936), overruled by the Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111 (1912); F. James & G. Hazard, Civil Procedure § 11.2 (2d ed. 1977); Restatement of Judgments § 93 (1942); 1B J. Moore, Federal Practice ¶¶ 0.412 [1], 0.441 [3] (2d ed. 1974).

[16] Compare McCaskill, Actions and Causes of Action, 34 Yale L. J. 614, 638 (1925) (defining "cause of action" as "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded"), with C. Clark, Handbook on the Law of Code Pleading 84 (1928) (adopting "modern" rule expanding "cause of action" to include more than one "right"). See also 1 H. Herman, Law of Estoppel and Res Judicata §§ 92, 96 ("cause of action"), 98, 103, 111 ("issue") (1886); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 826, 841–843 (1952).

victed in state court, would be precluded from raising against police officers a constitutional claim arising out of his arrest.

Also, the process of deciding in a state criminal trial whether to exclude or admit evidence is not at all the equivalent of a § 1983 proceeding. The remedy sought in the latter is utterly different. In bringing the civil suit the criminal defendant does not seek to challenge his conviction collaterally. At most, he wins damages. In contrast, the exclusion of evidence may prevent a criminal conviction. A trial court, faced with the decision whether to exclude relevant evidence, confronts institutional pressures that may cause it to give a different shape to the Fourth Amendment right from what would result in civil litigation of a damages claim. Also, the issue whether to exclude evidence is subsidary to the purpose of a criminal trial, which is to determine the guilt or innocence of the defendant, and a trial court, at least subconsciously, must weigh the potential damage to the truth-seeking process caused by excluding relevant evidence. See *Stone* v. *Powell*, 428 U. S. 465, 489–495 (1976). Cf. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 411–412 (1971) (dissenting opinion).

A state criminal defendant cannot be held to have chosen "voluntarily" to litigate his Fourth Amendment claim in the state court. The risk of conviction puts pressure upon him to raise all possible defenses.[17] He also faces uncertainty about the wisdom of forgoing litigation on *any* issue, for there is the possibility that he will be held to have waived his right to appeal on that issue. The "deliberate bypass" of state procedures, which the imposition of collateral estoppel under these circumstances encourages, surely is not a preferred goal. To hold that a criminal defendant who raises a Fourth Amendment claim at his criminal trial "freely and without reservation submits his federal claims for decision by the state

[17] See *Moran* v. *Mitchell*, 354 F. Supp. 86, 88–89 (ED Va. 1973) (noting the defendant's dilemma).

courts," see *England* v. *Medical Examiners*, 375 U. S., at 419, is to deny reality. The criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed. To force him to a choice between forgoing either a potential defense or a federal forum for hearing his constitutional civil claim is fundamentally unfair.

I would affirm the judgment of the Court of Appeals.

UNITED STATES v. DiFRANCESCO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-567. Argued October 6, 1980—Decided December 9, 1980

The Organized Crime Control Act of 1970, 18 U. S. C. § 3576, grants the United States the right, under specified conditions, to appeal the sentence imposed upon a "dangerous special offender." Respondent was convicted of federal racketeering offenses at a trial in Federal District Court. He was sentenced as a dangerous special offender under 18 U. S. C. § 3575 to two 10-year prison terms, to be served concurrently with each other and with a 9-year sentence previously imposed on convictions at an unrelated federal trial. The United States sought review of the dangerous special offender sentences under § 3576, claiming that the District Court abused its discretion in imposing sentences that amounted to additional imprisonment of respondent for only one year, in the face of the findings the court made after the dangerous special offender hearing. The Court of Appeals dismissed the appeal on double jeopardy grounds.

Held: Section 3576 does not violate the Double Jeopardy Clause of the Fifth Amendment. Pp. 126-143.

(a) Section 3576 does not violate the Double Jeopardy Clause's guarantee against multiple trials. "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569-570. Accordingly, the Government's taking of a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive respondent of the benefit of a more lenient sentence. Neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support the proposition that a criminal sentence, once pronounced, is to be accorded constitutional finality similar to that which attaches to a jury's verdict of acquittal. The Double Jeopardy Clause does not provide the defendant with a right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Pp. 132-138.

(b) The increase of a sentence on review under § 3576 does not constitute multiple punishment in violation of the Double Jeopardy Clause. The argument that the defendant perceives the length of his sentence as

finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances, there can be no expectation of finality in the original sentence. Pp. 138–139.

(e) The conclusion that § 3576 violates neither the guarantee against multiple punishment nor the guarantee against multiple trials is consistent with those opinions in which this Court has upheld the constitutionality of two-stage criminal proceedings. Cf. *Swisher* v. *Brady*, 438 U. S. 204. Pp. 139–141.

604 F. 2d 769, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and STEVENS, JJ., joined, *post*, p. 143. STEVENS, J., filed a dissenting opinion, *post*, p. 152.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Victor D. Stone.*

Edgar C. DeMoyer argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922, contains, among other things, a definition of "dangerous special offender," 18 U. S. C. §§ 3575 (e) and (f);[1] authorizes the imposition of an increased sentence upon

*Briefs of *amici curiae* urging affirmance were filed by *Quin Denvir* and *Laurance S. Smith* for the State Public Defender of California; and by *Martin Michaelson* for the American Civil Liberties Union.

[1] Section 3575 provides, so far as pertinent for this case:

"(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo con-

a convicted dangerous special offender, § 3575 (b); and grants the United States the right, under specified conditions, to

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tendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, [or] be disclosed to the jury . . . .

"(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. . . . In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

. . . . . .

"(e) A defendant is a special offender for purposes of this section if—

. . . . . .

"(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance,

take that sentence to the Court of Appeals for review, § 3576.[2] The issue presented by this case is whether § 3576,

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direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

". . . For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristic[s] and are not isolated events.

"(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

[2] Section 3576 reads in full as follows:

"With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United

authorizing the United States so to appeal, violates the Double Jeopardy Clause [3] of the Fifth Amendment of the Constitution.[4]

States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review."

Section 3576 has a twin in 21 U. S. C. § 849 (h). This was enacted as § 409 (h) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1266.

[3] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5.

[4] Academic and professional commentary on the general issue is divided. For conclusions that prosecution appeals of sentences do not violate the Double Jeopardy Clause, see Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001 (1980); Stern, Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences, 18 Am. Crim. L. Rev. 51 (1980); Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19 (1978). For conclusions that such appeals are unconstitutional, see Spence, The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?, 37 Md. L. Rev. 739 (1978); Freeman & Earley, *United States v. DiFrancesco:* Government Appeal of Sentences, 18 Am. Crim. L. Rev. 91 (1980); Note, 63 Va. L. Rev. 325 (1977); Report on Government Appeal of Sentences, 35 Bus. Lawyer 617, 624–628 (1980). At least one commentator-witness some time ago regarded the answer to the constitutional issue as "simply unclear." Low, Special Offender Sentencing, 8 Am. Crim. L. Q. 70, 91 (1970) (reprint of statement submitted at Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 184, 197 (1969)).

See also ABA Standards for Criminal Justice 20–1.1 (d), and appended commentary, pp. 20–7 through 20–13 (2d ed. 1980).

I

At a 1977 jury trial in the United States District Court for the Western District of New York, respondent Eugene DiFrancesco was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, and of conspiring to commit that offense, in violation of 18 U. S. C. §§ 1962 (c) and (d).[5] At another jury trial in 1978—before a different judge in the same District—based on an indictment returned prior to the racketeering indictment, respondent was convicted of damaging federal property, in violation of 18 U. S. C. § 1361, of unlawfully storing explosive materials, in violation of 18 U. S. C. § 842 (j), and of conspiring to commit those offenses, in violation of 18 U. S. C. § 371.[6]

Respondent was first sentenced, in March 1978, on his convictions at the later trial. He received eight years on the charge for damaging federal property and five years on the conspiracy charge, these sentences to be served concurrently, and one year on the unlawful storage charge, to be served consecutively to the other sentences. This made a total of nine years' imprisonment. In April, respondent was sentenced as a dangerous special offender under § 3575 to two 10-year terms on the racketeering counts upon which he was convicted at the earlier trial; the court specified that these sentences were to be served concurrently with each other and with the sentences imposed in March. The dangerous special

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[5] The maximum punishment for a violation of § 1962 is a fine of not more than $25,000 or imprisonment for not more than 20 years, or both, plus specified forfeitures. § 1963.

[6] Section 1361 specifies that the maximum punishment for its violation, if the damage exceeds $100, is a fine of not more than $10,000 or imprisonment for not more than 10 years, or both. The maximum punishment for a violation of § 842 (j) is a fine of not more than $1,000 or imprisonment for not more than one year, or both. § 844 (b). Section 371 specifies that the maximum punishment for its violation, when the offense that is the object of the conspiracy is not a misdemeanor, is a fine of not more than $10,000 or imprisonment of not more than five years, or both.

offender charge and sentences thus resulted in additional punishment of only about a year.

Respondent appealed the respective judgments of conviction to the Court of Appeals for the Second Circuit, and the United States sought review, under § 3576, of the sentences imposed upon respondent as a dangerous special offender. The Court of Appeals unanimously affirmed the judgments of conviction. By a divided vote, however, that court dismissed the Government's appeal on double jeopardy grounds. 604 F. 2d 769 (1979). The two judges in the majority thus did not address the merits of the special offender issue. The third judge, while agreeing that the Government's appeal was to be dismissed, based that conclusion not on constitutional grounds, as did the majority, but on the grounds that §§ 3575 and 3576 were inapplicable to the facts of the case. 604 F. 2d, at 787.[7] Because of the importance of the constitutional question, we granted the Government's petition for certiorari, which confined itself to that single issue. 444 U. S. 1070 (1980). Respondent has not filed a cross-petition.

II

At the earlier racketeering trial, the evidence showed that respondent was involved in an arson-for-hire scheme in the Rochester, N. Y., area that was responsible for at least eight fires between 1970 and 1973; that the ring collaborated with property owners to set fire to buildings in return for shares of the insurance proceeds; and that insurers were defrauded of approximately $480,000 as a result of these fires. At the second trial, the evidence showed that respondent partici-

[7] The applicability of §§ 3575 and 3576 to this respondent, the issue upon which the concurring judge rested his conclusion, is not before us. The majority of the Court of Appeals observed, in passing, that the trial court "properly could find that the statute was applicable." 604 F. 2d, at 780–781, n. 13. In any event, the issue may be considered, if there is any reason for so doing, on remand.

pated in the 1970 "Columbus Day bombings," including the bombing of the federal building at Rochester.

Prior to the first trial, the Government, in accordance with § 3575 (a), filed with the trial court a notice alleging that respondent was a dangerous special offender. This notice recited the Government's intention to seek enhanced sentences on the racketeering counts in the event respondent was convicted at that trial. After respondent was found guilty, a dangerous special offender hearing, pursuant to § 3575 (b), was held. At the hearing, the Government relied upon the testimony adduced at the trial and upon public documents that attested to other convictions of respondent for the Columbus Day bombings, for loansharking, and for murder. App. 27–28, 30. The defense offered no evidence. It conceded the validity of the public records, *id.*, at 31–32, but objected to any consideration of the murder offense because that conviction had been vacated on appeal. *Id.*, at 28–29.

The District Court made findings of fact and ruled that respondent was a dangerous special offender within the meaning of the statute. The findings set forth respondent's criminal record and stated that that record revealed "virtually continuous criminal conduct over the past eight years, interrupted only by relatively brief periods of imprisonment in 1975, 1976 and 1977." *Id.*, at 41. The court found, in addition, that respondent's "criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the defendant's complete and utter disregard for the public safety. The defendant, by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only in that way can the public be protected from further violent and dangerous criminal

conduct by the defendant." *Id.*, at 43.[8] The court thereupon sentenced respondent under § 3575 (b) to the concurrent 10-year terms hereinabove described. App. 45–46.

The United States then took its appeal under § 3576, claiming that the District Court abused its discretion in imposing sentences that amounted to additional imprisonment of respondent for only one year, in the face of the findings the court made after the dangerous special offender hearing.[9]

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[8] The court then summarized its findings and set forth its conclusion as follows:

"In sum, this Court, on the basis of the facts above, finds that the defendant was over the age of 21 years when the crimes for which he stands convicted were committed; that the defendant stands convicted of two felonies; that one felony was committed in furtherance of a conspiracy (18 U. S. C. 1962 (c)); that the other felony was itself a conspiracy (18 U. S. C. 1962 (d)); that the conspiracy and the substantive crime involved at least four persons other than the defendant . . . ; that the conspiracy and the substantive crime was to engage in a pattern of conduct which was criminal under the laws of the State of New York (New York Penal Code, Article 150) and of the United States (18 U. S. C. 1341); that the defendant did initiate, organize, plan, direct, manage and supervise at least part of the conspiracy and the substantive criminal acts; [and that confinement of the defendant for a period longer than that provided for violation of 18 U. S. C. 1962 (c) or 1962 (d) is required for the protection of the public from further criminal conduct by the defendant.]

"WHEREFORE, it is the finding of this Court that the defendant Eugene DiFrancesco, having been convicted of two felony charges before this Court on October 31, 1977, and having been over the age of 21 years at the time of the commission of those felonies is a dangerous special offender within the meaning of sections 3575 (e) (3) and 3575 (f) of Title 18 of the United States Code, and therefore subject to the sentencing provisions of section 3575 (b) of Title 18 of the United States Code." App. 43–44.

The bracketed phrase is in the findings as typed, but a line has been drawn through it in ink by hand. No persuasive explanation for this deletion, if it is one, has been offered this Court.

[9] It was indicated at oral argument, Tr. of Oral Arg. 5, 37, 39, and in one of the briefs, Brief for Respondent 12, as well as in the opinion of the

The dismissal of the Government's appeal by the Court of Appeals rested specifically upon its conclusion, which it described as "inescapable," that "to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time 'in jeopardy of life or limb.'" 604 F. 2d, at 783.

III

While this Court, so far as we are able to ascertain, has never invalidated an Act of Congress on double jeopardy grounds, it has had frequent occasion recently to consider and pass upon double jeopardy claims raised in various contexts. See *United States* v. *Jorn*, 400 U. S. 470 (1971); *Colten* v. *Kentucky*, 407 U. S. 104 (1972); *Illinois* v. *Somerville*, 410 U. S. 458 (1973); *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973); *United States* v. *Wilson*, 420 U. S. 332 (1975); *United States* v. *Jenkins*, 420 U. S. 358 (1975); *Serfass* v. *United States*, 420 U. S. 377 (1975); *Breed* v. *Jones*, 421 U. S. 519 (1975); *United States* v. *Dinitz*, 424 U. S. 600 (1976); *Ludwig* v. *Massachusetts*, 427 U. S. 618 (1976); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Lee* v. *United States*, 432 U. S. 23 (1977); *Arizona* v. *Washington*, 434 U. S. 497 (1978); *Burks* v. *United States*, 437 U. S. 1 (1978); *Greene* v. *Massey*, 437 U. S. 19 (1978); *Crist* v. *Bretz*, 437 U. S. 28 (1978); *Sanabria* v. *United States*, 437 U. S. 54 (1978); *United States* v. *Scott*, 437 U. S. 82

Court of Appeals, 604 F. 2d, at 781, and n. 17, that this is the first case in which the United States specifically has sought review of a sentence under § 3576. Inasmuch as the statute was enacted a decade ago, this fact might be said to indicate either little use of the special offender statute by the United States, or prosecutorial concern about its constitutionality, or that federal trial judges are imposing sufficiently severe sentences on special offenders to make review unnecessary. No definitive explanation, however, has been offered. An attempt on the part of this Court to explain the nonuse of the statute would be speculation, and we shall not indulge in it.

(1978); *Swisher* v. *Brady*, 438 U. S. 204 (1978); *Whalen* v. *United States*, 445 U. S. 684 (1980); *Illinois* v. *Vitale*, 447 U. S. 410 (1980).

These cited cases are the additions of just the past decade to the less numerous list of well-known double jeopardy decisions of past years. Among those earlier cases are *United States* v. *Perez*, 9 Wheat. 579 (1824); *Ex parte Lange*, 18 Wall. 163 (1874), *United States* v. *Ball*, 163 U. S. 662 (1896); *Kepner* v. *United States*, 195 U. S. 100 (1904); *Green* v. *United States*, 355 U. S. 184 (1957); *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Downum* v. *United States*, 372 U. S. 734 (1963); *United States* v. *Tateo*, 377 U. S. 463 (1964).

That the Clause is important and vital in this day is demonstrated by the host of recent cases. That its application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis. See, *e. g.*, *United States* v. *Scott*, *supra*, overruling *United States* v. *Jenkins*, *supra;* and *Burks* v. *United States*, 437 U. S., at 18, overruling, at least in part, certain prior cases in the area. See also Note, 24 Minn. L. Rev. 522 (1940); Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 82. Nonetheless, the following general principles emerge from the Court's double jeopardy decisions and may be regarded as essentially settled:

—The general design of the Double Jeopardy Clause of the Fifth Amendment is that described in *Green* v. *United States:*

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individ-

> ual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." 355 U. S., at 187–188.

See also *Serfass* v. *United States*, 420 U. S., at 387–388; *Crist* v. *Bretz*, 437 U. S., at 35. This concept has ancient roots centering in the common-law pleas of *autre fois acquit*, *autre fois convict*, and pardon, 4 W. Blackstone, Commentaries 329–330 (1st ed. 1769), and found expression in the legal tradition of colonial America. See *Green* v. *United States*, 355 U. S., at 187; *id.*, at 200 (dissenting opinion); *United States* v. *Wilson*, 420 U. S., at 339–342; *United States* v. *Scott*, 437 U. S., at 87.

—The stated design, in terms of specific purpose, has been expressed in various ways. It has been said that "a" or "the" "primary purpose" of the Clause was "to preserve the finality of judgments," *Crist* v. *Bretz*, 437 U. S., at 33, or the "integrity" of judgments, *United States* v. *Scott*, 437 U. S., at 92. But it has also been said that "central to the objective of the prohibition against successive trials" is the barrier to "affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U. S., at 11; *Swisher* v. *Brady*, 438 U. S., at 215–216. Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own. See *United States* v. *Scott*, 437 U. S., at 105, n. 4 (dissenting opinion); *United States* v. *Wilson*, 420 U. S., at 352.

Still another consideration has been noted:

> "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona* v. *Washington*, 434

U. S., at 503, quoting from *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949).

See *Swisher* v. *Brady*, 438 U. S., at 214–215; *Crist* v. *Bretz*, 437 U. S., at 36.

On occasion, stress has been placed upon punishment:

"It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Ex parte Lange*, 18 Wall., at 173.

—The Court has summarized:

"That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (Footnotes omitted.) *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969).[10]

See *Illinois* v. *Vitale*, 447 U. S., at 415.

—An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See *Fong Foo* v. *United States*, 369 U. S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona* v. *Washington*, 434 U. S., at 503. The law "attaches particular significance to an acquittal." *United States* v. *Scott*, 437 U. S., at 91.

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[10] This recital is described as this Court's "favorite saying about double jeopardy" and is the subject of comment, not uncritical, in Professor Westen's provocative and thoughtful article, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1062–1063 (1980).

This is justified on the ground that, however mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S., at 188. See also *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 571, 573, n. 12. "[W]e necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision" (emphasis in original). *Burks* v. *United States*, 437 U. S., at 16.[11]

—The result is definitely otherwise in cases where the trial has not ended in an acquittal. This Court has long recognized that the Government may bring a second prosecution where a mistrial has been occasioned by "manifest necessity." *United States* v. *Perez*, 9 Wheat, at 580. See *Arizona* v. *Washington*, 434 U. S., at 514–516; *Illinois* v. *Somerville*, 410 U. S. 458 (1973). Furthermore, reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request. *United States* v. *Dinitz*, 424 U. S., at 606–611.

Similarly, where the trial has been terminated prior to a jury verdict at the defendant's request on grounds unrelated to guilt or innocence, the Government may seek appellate review of that decision even though a second trial would be necessitated by a reversal. See *United States* v. *Scott*, 437 U. S., at 98–99. *A fortiori*, the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact. See *United States* v. *Wilson*, *supra*; *United States* v. *Rojas*, 554 F. 2d 938, 941 (CA9 1977); *United States* v. *De Garces*, 518 F. 2d 1156, 1159 (CA2 1975).

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[11] Professor Westen describes it succinctly this way:

"The prohibition on retrial following an acquittal is based on a jury's prerogative to acquit against the evidence . . . ." *Id.*, at 1012, 1063.

Finally, if the first trial has ended in a conviction, the double jeopardy guarantee "imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside" (emphasis in original). *North Carolina* v. *Pearce*, 395 U. S., at 720. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U. S., at 466. "[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, 437 U. S., at 91. There is, however, one exception to this rule: the Double Jeopardy Clause prohibits retrial after a conviction has been reversed because of insufficiency of the evidence. *Burks* v. *United States*, *supra*; *Greene* v. *Massey*, 437 U. S., at 24.

—Where the Clause does apply, "its sweep is absolute." *Burks* v. *United States*, 437 U. S., at 11, n. 6.

—The United States "has no right of appeal in a criminal case, absent explicit statutory authority." *United States* v. *Scott*, 437 U. S., at 84–85. But with the enactment of the first paragraph of what is now 18 U. S. C. § 3731 by Pub. L. 91–644 in 1971, 84 Stat. 1890, permitting a Government appeal in a criminal case except "where the double jeopardy clause of the United States Constitution prohibits further prosecution," the Court necessarily concluded that "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, 420 U. S., at 337. See also *United States* v. *Scott*, 437 U. S., at 85.[12]

[12] And, of course, it is surely settled that the Double Jeopardy Clause of the Fifth Amendment has application to the States through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U. S. 784 (1969); *Illinois* v. *Vitale*, 447 U. S. 410, 415 (1980).

IV

From these principles, certain propositions pertinent to the present controversy emerge:

A. The Double Jeopardy Clause is *not* a complete barrier to an appeal by the prosecution in a criminal case. "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 569–570. See also *United States* v. *Wilson*, 420 U. S., at 342; *United States* v. *Scott*, *supra*. From this it follows that the Government's taking a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive respondent of the benefit of a more lenient sentence. Indeed, in *Wilson* and again in *Scott* the defendant had won a *total* victory in the trial court, for that tribunal had terminated the case in a manner that would have allowed him to go free. The Government, nevertheless, over the constitutional challenge, was allowed to appeal.

B. The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.

As has been noted above, the Court has said that the prohibition against multiple trials is the "controlling constitutional principle." *United States* v. *Wilson*, 420 U. S., at 346; *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 569. But, of course, the Court's cases show that even the protection against retrial is not absolute. It is acquittal that prevents retrial even if legal error was committed at the trial. *United States* v. *Ball*, 163 U. S. 662 (1896). This is why the "law attaches particular significance to an acquittal." *United*

States v. *Scott*, 437 U. S., at 91. Appeal of a sentence, therefore, would seem to be a violation of double jeopardy only if the original sentence, as pronounced, is to be treated in the same way as an acquittal is treated, and the appeal is to be treated in the same way as a retrial. Put another way, the argument would be that, for double jeopardy finality purposes, the imposition of the sentence is an "implied acquittal" of any greater sentence. See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 634–635 (1965).

We agree with the Government that this approach does not withstand analysis. Any reliance the Court of Appeals may have placed on *Kepner* v. *United States*, 195 U. S. 100 (1904),[13] is misplaced, for the focus of *Kepner* was on the undesirability of a second *trial*. There are, furthermore, fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal.

Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. The common-law writs of *autre fois acquit* and *autre fois convict* were protections against retrial. See *United States* v. *Wilson*, 420 U. S., at 340. Although the distinction was not of great importance early in the English common law because nearly all felonies, to which double jeopardy principles originally were limited, were punishable by the critical sentences of death or deportation, see Comment, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L. J. 339, 342–343 (1956), it gained importance when sentences of imprisonment became common. The trial court's increase of a sentence, so long as it took place

[13] While the challenge in *Kepner* was based not on the Double Jeopardy Clause, but on a statute extending double jeopardy protection to the Philippines, this Court has accepted that decision "as having correctly stated the relevant double jeopardy principles." See *United States* v. *Wilson*, 420 U. S. 332, 346, n. 15 (1975).

during the same term of court, was permitted. This practice was not thought to violate any double jeopardy principle. See *Ex parte Lange*, 18 Wall., at 167; *id.*, at 192–194 (dissenting opinion); 3 E. Coke, Institutes § 438 (13th ed. 1789). See also *Commonwealth* v. *Weymouth*, 84 Mass. 144 (1861). The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind. See *United States* v. *Wilson*, 420 U. S., at 340–342; *Green* v. *United States*, 355 U. S., at 200–201 (dissenting opinion). This accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve that sentence. See, *e. g.*, *United States* v. *DiLorenzo*, 429 F. 2d 216, 221 (CA2 1970), cert. denied, 402 U. S. 950 (1971); *Vincent* v. *United States*, 337 F. 2d 891, 894 (CA8 1964), cert. denied, 380 U. S. 988 (1965). Thus it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution. Indeed, countries that trace their legal systems to the English common law permit such appeals. See Can. Rev. Stat. §§ 605 (1)(b) and 748 (b)(ii) (1970), Martin's Annual Criminal Code 523, 636 (E. Greenspan ed. 1979); New Zealand Crimes Act 1961, as amended by the Crimes Amendment Act of 1966, 1 Repr. Stat. N. Z. § 383 (2) (1979). See M. Friedland, Double Jeopardy 290 (1969).

C. This Court's decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal. In *Bozza* v. *United States*, 330 U. S. 160 (1947), the defendant was convicted of a crime carrying a mandatory minimum sentence of fine and imprisonment. The trial court, however, sentenced the defendant only to imprisonment. Later on the same day, the judge recalled the defendant and imposed both fine and im-

prisonment. This Court held that there was no double jeopardy. "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Id.*, at 166–167. What the judge had done "did not twice put petitioner in jeopardy for the same offense." *Id.*, at 167. And in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), the Court held that there was no absolute constitutional bar to the imposition of a more severe sentence on reconviction after the defendant's successful appeal of the original judgment of conviction. The rule of *Pearce*, permitting an increase of sentence on retrial is a "well-established part of our constitutional jurisprudence." *Id.*, at 720. See *Chaffin* v. *Stynchcombe*, 412 U. S., at 24. See also *Stroud* v. *United States*, 251 U. S. 15 (1919). If any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial.[14] While *Pearce* dealt

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[14] The principal dissent fails to recognize the import of *Pearce*. According to that dissent, the "analytic similarity of a verdict of acquittal and the imposition of sentence" requires the conclusion that sentences may not be increased after imposition without violating the Double Jeopardy Clause. *Post*, at 146. Thus, the imposition of a 10-year sentence where a 25-year sentence is permissible is, in the dissent's view, an implicit acquittal of the greater sentence. *Ibid.* But precisely this argument was unsuccessfully advanced by Justices Douglas and Harlan in *Pearce*. See 395 U. S., at 726–728, and n. 1 (Douglas, J., concurring); *id.*, at 744–746 (Harlan, J., concurring in part and dissenting in part). The majority in *Pearce* thus rejected the notion that the imposition of a sentence less than the maximum operates as an implied acquittal of any greater sentence. See *id.*, at 720, and n. 16.

Further, the principal dissent's attempt to distinguish *Pearce* on the grounds that there the imposition of the sentence followed a retrial, rather than an appeal, is unconvincing. In *Green* v. *United States*, 355 U. S. 184 (1957), the Court held that a defendant who had been convicted of the lesser included offense of second-degree murder at his first trial could not be convicted of the greater offense of first-degree murder on retrial; thus, the conviction of the lesser included offense operated as an implicit acquittal of the greater. Since the defendant sought and obtained a retrial in each

with the imposition of a new sentence after retrial rather than, as here, after appeal, that difference is no more than a "conceptual nicety." *North Carolina* v. *Pearce*, 395 U. S., at 722.

D. The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period of any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any Government appeal under 18 U. S. C. § 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in

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case, the difference in result reached in *Green* and *Pearce* can be explained only on the grounds that the imposition of sentence does not operate as an implied acquittal of any greater sentence.

JUSTICE STEVENS' dissent, with its reliance on Justice Harlan's separate opinion in *Pearce*, concurring in part and dissenting in part, 395 U. S., at 744, in effect argues nothing more than that *Pearce* was wrongly decided. We are not inclined to overrule *Pearce*.

large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature.

E. The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Congress has established many types of criminal sanctions under which the defendant is unaware of the precise extent of his punishment for significant periods of time, or even for life, yet these sanctions have not been considered to be violative of the Clause. Thus, there is no double jeopardy protection against revocation of probation and the imposition of imprisonment. See, *e. g.*, *Thomas* v. *United States*, 327 F. 2d 795 (CA10), cert. denied, 377 U. S. 1000 (1964). There are other situations where probation or parole may be revoked and sentence of imprisonment imposed. See, *e. g.*, *United States* v. *Kuck*, 573 F. 2d 25 (CA10 1978); *United States* v. *Walden*, 578 F. 2d 966, 972 (CA3 1978), cert. denied, 444 U. S. 849 (1979); *United States* v. *Jones*, 540 F. 2d 465 (CA10 1976), cert. denied, 429 U. S. 1101 (1977); *Dunn* v. *United States*, 182 U. S. App. D. C. 261, 561 F. 2d 259 (1977). While these criminal sanctions do not involve the increase of a final sentence, and while the defendant is aware at the original sentencing that a term of imprisonment later may be imposed, the situation before us is different in no critical respect. Respondent was similarly aware that a dangerous special offender sentence is subject to increase on appeal. His legitimate expectations are not defeated if his sentence is increased on appeal any more than are the expectations of the defendant who is placed on parole or probation that is later revoked.

All this highlights the distinction between acquittals and sentences. *North Carolina* v. *Pearce* and *Bozza* v. *United States* demonstrate that the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase. Because of the critical difference be-

tween an acquittal and a sentence, the acquittal cases, such as *Kepner* v. *United States*, 195 U. S. 100 (1904), and *Fong Foo* v. *United States*, 369 U. S. 141 (1962), do not require a contrary result.

V

We turn to the question whether the increase of a sentence on review under § 3576 constitutes multiple punishment in violation of the Double Jeopardy Clause. The Court of Appeals found that it did. 604 F. 2d, at 784–787. This conclusion appears to be attributable primarily to that court's extending to an appeal this Court's dictum in *United States* v. *Benz*, 282 U. S. 304, 307 (1931), to the effect that the federal practice of barring an increase in sentence by the trial court after service of the sentence has begun is constitutionally based.[15] The real and only issue in *Benz*, however, was whether the trial judge had the power to *reduce* a defendant's sentence after service had begun. The Court held that the trial court had such power. It went on to say gratuitously, however, *id.*, at 307–308, and with quotations from a textbook and from *Ex parte Lange*, 18 Wall., at 167, 173, that the trial court may not *increase* a sentence, even though the increase is effectuated during the same court session, if the defendant has begun service of his sentence. But the dictum's source, *Ex parte Lange*, states no such principle. In *Lange* the trial court erroneously imposed both imprisonment and fine, even though it was authorized by statute to impose only one or the other of these two punishments. Lange had paid the fine and served five days in prison. The trial court then resentenced him to a year's imprisonment. The fine having been paid and the defendant having suffered one of the alternative punishments, "the power of the court to punish further was gone." *Id.*, at 176. The Court also observed that to impose

[15] Somewhat similar dicta are present in *Murphy* v. *Massachusetts*, 177 U. S. 155, 160 (1900), and in the plurality opinion in *Reid* v. *Covert*, 354 U. S. 1, 37–38, n. 68 (1957). The latter is not a double jeopardy case.

a year's imprisonment (the maximum) after five days had been served was to punish twice for the same offense. *Id.*, at 175. The holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application. We confine the dictum in *Benz* to *Lange*'s specific context. Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence. See S. Rep. No. 91–617, p. 97 (1969); Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19, 32 (1978).

The guarantee against multiple punishment that has evolved in the holdings of this Court plainly is not involved in this case. As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment. See *Whalen* v. *United States*, 445 U. S., at 688–689; *id.*, at 697–698 (concurring opinion). The punishment authorized by Congress under §§ 3575 and 3576 is clear and specific and, accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange*.

VI

The conclusion that § 3576 violates neither the guarantee against multiple punishment nor the guarantee against multiple trials is consistent with those opinions in which the Court has upheld the constitutionality of two-stage criminal pro-

ceedings. See *Ludwig* v. *Massachusetts*, 427 U. S., at 630–632. See also *Colten* v. *Kentucky*, 407 U. S., at 118–120.[16]

Swisher v. *Brady*, 438 U. S. 204 (1978), affords particular support and, indeed, precedent for the decision we reach. That case concerned a Maryland scheme for the use of a master in a Juvenile Court proceeding. The master, after receiving evidence, concluded that the State had failed to show beyond a reasonable doubt that the minor had committed an assault and robbery. The master's recommendation to the Juvenile Court set forth that conclusion. The State filed exceptions, as it was authorized to do under a procedural rule, and the minor responded with a motion to dismiss the notice of exceptions on the ground that the procedural rule, with its provision for a *de novo* hearing, violated the Double Jeopardy Clause. The state courts denied relief. On federal habeas, this Court held that the Maryland system did not violate the Clause. Important in the decision was the fact that the system did not provide the prosecution a "second crack." *Id.*, at 216. The record before the master was closed "and additional evidence can be received by the Juvenile Court judge only with the consent of the minor." *Ibid.* The Court also held that there was nothing in the procedure that "unfairly subjects the defendant to the embarrassment, expense, and ordeal of a second trial. . . ." *Ibid.* The "burdens are more akin to those resulting from a judge's permissible request for post-

[16] We read § 3576 as establishing at the most a two-stage sentencing procedure. Indeed, the original bill introduced in Congress specifically stated that the sentence was not to be considered final until after disposition of review or until the expiration of the time for appeal. S. 30, 91st Cong., 1st Sess., § 3577 (1969); Measures Relating to Organized Crime: Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 28–29 (1969). Congress, however, was advised that this language was not needed in order to preserve the constitutionality of the statute, and it was omitted. *Id.*, at 196, and n. 18. See 65 Cornell L. Rev. 715, 730 (1980).

trial briefing or argument following a bench trial than to the 'expense' of a full-blown second trial . . . . " *Id.*, at 217. And "[t]o the extent the Juvenile Court judge makes supplemental findings . . .—either *sua sponte*, in response to the State's exceptions, or in response to the juvenile's exceptions, and either on the record or on a record supplemented by evidence to which the parties raise no objection—he does so without violating the constraints of the Double Jeopardy Clause." *Id.*, at 219.

The Court in *Swisher* characterized the proceedings before the master and those before the Juvenile Court judge as a continuing single process and distinguished the situation in *Breed* v. *Jones*, 421 U. S. 519 (1975), where it had been held that a juvenile was placed twice in jeopardy when, after an adjudicatory finding in Juvenile Court, he was transferred to an adult criminal court and tried and convicted for the same conduct.

Like the Maryland system at issue in *Swisher*, § 3576 does not subject a defendant to a second trial. The Maryland system, of course, concerns a master, whereas § 3576 concerns a federal trial court. This difference, however, is of no constitutional consequence, for the federal trial court has no power to impose a final dangerous special offender sentence that is not subject to appeal. Section 3576, indeed, is more limited in scope than the Maryland procedure in *Swisher*. The federal statute specifies that the Court of Appeals may increase the sentence only if the trial court has abused its discretion or employed unlawful procedures or made clearly erroneous findings. The appellate court thus is empowered to correct only a legal error. Under the Maryland procedure involved in *Swisher*, the judge need not find legal error on the part of the master; he is free to make a *de novo* determination of the facts relating to guilt or innocence. If that is consistent with the guarantee against double jeopardy, as the Court held it was, the limited appellate review of a sentence authorized by § 3576 is necessarily constitutional.

The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action. See *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 571; *United States* v. *Wilson*, 420 U. S., at 336. Congress could have achieved the purpose of § 3576 by a slightly different statute whose constitutionality would be unquestionable. Congress might have provided that a defendant found to be a dangerous special offender was to receive a specified mandatory term, but that the trial court then could recommend a lesser sentence to the court of appeals, which would be free to accept the recommendation or to reject it. That scheme would offer no conceivable base for a double jeopardy objection. Yet the impact on the defendant would be exactly the same as, and possibly worse than, the impact under § 3576 as written. No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional.

It is perhaps worth noting in passing that § 3576 represents a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges "to mete out light sentences in cases involving organized crime management personnel." The Challenge of Crime in a Free Society, Report by the President's Commission on Law Enforcement and Administration of Justice 203 (1967). Section 3576 was Congress' response to that plea. See S. Rep. No. 91–617, pp. 85–87 (1969). The statute is limited in scope and is narrowly focused on the problem so identified. It is not an example of "Government oppression" against which the Double Jeopardy Clause stands guard. See *United States* v. *Scott*, 437 U. S., at 99. It has been observed elsewhere that sentencing is one of the areas of the criminal justice system most in need of reform. See M. Frankel, Criminal Sentences: Law Without Order (1973); P. O'Donnell, M. Churgin, & D. Curtis, Toward a Just and

Effective Sentencing System (1977). Judge Frankel himself has observed that the "basic problem" in the present system is "the unbridled power of the sentencers to be arbitrary and discriminatory." Frankel, *supra*, at 49. Appellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing.

We conclude that § 3576 withstands the constitutional challenge raised in the case before us. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Title 18 U. S. C. § 3576 [1] authorizes the United States to appeal [2] from a sentence imposed by a federal district judge on the ground that the sentence is too lenient and further permits the appellate court to increase the severity of the initial sentence. The Court holds that § 3576 violates neither

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[1] Section 3576 states in pertinent part:

"[A] review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. . . . Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing . . . ."

[2] The United States may appeal decisions in a criminal case only if so authorized by statute. *United States* v. *Scott*, 437 U. S. 82, 84–85 (1978); *United States* v. *Sanges*, 144 U. S. 310 (1892).

the prohibition against multiple punishments nor the prohibition against multiple trials embodied in the Double Jeopardy Clause of the Fifth Amendment.[3] Because the Court fundamentally misperceives the appropriate degree of finality to be accorded the imposition of sentence by the trial judge, it reaches the erroneous conclusion that enhancement of a sentence pursuant to § 3576 is not an unconstitutional multiple punishment. I respectfully dissent.

I

The Court acknowledges, as it must, that the Double Jeopardy Clause has two principal purposes: to "protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Green* v. *United States*, 355 U. S. 184, 187 (1957), and to prevent imposition of multiple punishments for the same offense, *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969). An overriding function of the Double Jeopardy Clause's prohibition against multiple trials is to protect against multiple punishments: "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Ex parte Lange*, 18 Wall. 163, 173 (1874).

An unconstitutional punishment need not derive exclusively from a second prosecution, but may stem from the imposition of more than one sentence following a single prosecution. *Ex parte Lange*, *supra*, and *In re Bradley*, 318 U. S. 50 (1943), provide examples of unconstitutional multiple punishments flowing from a single trial—imprisonment *and* fine for an offense punishable by either imprisonment *or* fine—but neither case purports to exhaust the reach of the Double Jeopardy Clause's prohibition against multiple punishments. Indeed, this Court has consistently assumed that an increase in the

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[3] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5.

severity of a sentence subsequent to its imposition—the issue presented in this case—also constitutes multiple punishment in violation of the Double Jeopardy Clause.[4] For example, in *United States* v. *Benz*, 282 U. S. 304, 307 (1931), the Court stated that "[t]he distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it [is based] upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense . . . ."[5] Similarly, in *Reid* v. *Covert*, 354 U. S. 1, 37–38, n. 68 (1957), the Court stated: "In *Swaim* v. *United States*, 165 U. S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional." Although the *Benz* and *Reid* statements may be dicta, nevertheless, the Court of Appeals correctly stated that "[a]lthough such dicta . . . are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court." 604 F. 2d 769, 785 (CA2 1979). My Brother REHNQUIST only recently noted that "the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a defendant's sentence

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[4] Under my view of the double jeopardy protection against multiple punishments, a sentence may not be increased once a technically correct sentence has been imposed. I would distinguish correction of a technically improper sentence which the Court has always allowed. See, *e. g.*, *Bozza* v. *United States*, 330 U. S. 160, 165–167 (1947).

[5] The Court dismisses the significance of *Benz* because it cited *Ex parte Lange*, 18 Wall. 163 (1874), which did not present the precise issue on which, according to the Court, *Benz* "gratuitously," *ante*, at 138, opined. It is true that *Lange* raised an issue somewhat different from *Benz*, but *Lange* did decide a question of unconstitutional multiple punishment. *Benz*' citation of *Lange*, then, was entirely appropriate.

for any particular statutory offense, even though the second sentence is within the limits set by the legislature." *Whalen* v. *United States*, 445 U. S. 684, 703 (1980) (dissenting opinion).

II

Not only has the Court repeatedly said that sentences may not be increased after imposition without violating the double jeopardy prohibition against multiple punishments, but the analytic similarity of a verdict of acquittal and the imposition of sentence requires this conclusion. A verdict of acquittal represents the factfinder's conclusion that the evidence does not warrant a finding of guilty. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572 (1977). Similarly, a guilty verdict of second-degree murder where the charge to the jury permitted it to find the defendant guilty of first-degree murder represents the factfinder's *implicit* finding that the facts do not warrant a first-degree murder conviction. Thus, a retrial on first-degree murder is constitutionally impermissible. *Green* v. *United States, supra;* see *Price* v. *Georgia*, 398 U. S. 323 (1970). The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the Double Jeopardy Clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal. The sentencing proceeding involves the examination and evaluation of facts about the defendant, which may entail the taking of evidence, and the pronouncement of a sentence. Thus, imposition of a 10-year sentence where a 25-year sentence is permissible under the sentencing statute constitutes a finding that the facts justify only a 10-year sentence and that a higher sentence is unwarranted. In both acquittals and sentences, the trier of fact makes a factual adjudication that removes from the defendant's burden of risk the charges of which he was acquitted and the potential sentence which he did not receive. Unless there is a basis for according greater

finality[6] to acquittals, whether explicit or implicit, than to sentences, the Court's result is untenable.[7]

The Court proffers several reasons why acquittals and sentences should be treated differently. None of them is persuasive. First, the Court suggests that common-law historical evidence supports its distinction between the finality accorded to verdicts and to sentences. *Ante*, at 133–134. The Court's observation that the "common-law writs of *autre fois acquit* and *autre fois convict* were protections against retrial," *ante*, at 133, is true, but that fact does not dispose of the additional purpose of the Double Jeopardy Clause to prevent multiple punishments of the sort authorized by § 3576. Moreover, the practice of increasing a sentence "so long as it took place during the same term of court," *ante*, at 133–134, or "so long as [the defendant] has not yet begun to serve that sentence," *ante*, at 134, has never been sanctioned by this Court.

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[6] The finality accorded sentences has been recognized in other contexts. *Berman* v. *United States*, 302 U. S. 211, 212 (1937) (Sentence is appealable by defendant notwithstanding suspension of execution. "Final judgment in a criminal case means sentence. The sentence is the judgment"); see *Corey* v. *United States*, 375 U. S. 169 (1963).

[7] The Court suggests that "[t]he law 'attaches particular significance to an acquittal,'" *ante*, at 129, quoting *United States* v. *Scott*, 437 U. S., at 91, and that "'we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision,'" *ante*, at 130, quoting *Burks* v. *United States*, 437 U. S. 1, 16 (1978) (emphasis in original). See *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) (directed verdict of acquittal by trial judge in middle of jury trial is entitled to finality and is unreviewable by appeal even though "based upon an egregiously erroneous foundation"). That explains in part the result reached in *United States* v. *Wilson*, 420 U. S. 332 (1975), which allowed an appellate court to reinstate a guilty verdict which was nullified by the trial judge's post-verdict dismissal of the indictment. *Wilson* involved correction of an error of law and reinstatement of an already existing fact adjudication. However, under § 3576, there is no fact adjudication for the court of appeals to reinstate where the purpose of the appeal is to increase the defendant's sentence. The appellate court would have to make its own fact determination and judgment as to the defendant's proper sentence.

Second, the Court posits that the Government's right to appeal a final sentence imposed by a trial judge "is different in no critical respect," *ante*, at 137, from parole and probation revocation, an extraordinary statement that overlooks obvious differences between the proceedings. A defendant knows after sentencing the maximum length of time he may serve, a maximum which can only be shortened by parole or probation. On the other hand, since parole and probation by definition are conditional, a defendant is on notice from the outset that a breach of those conditions may result in revocation of beneficial treatment. At the very worst from the defendant's point of view, the original sentence may be reinstated. Furthermore, revocation of parole or probation only results from a change in circumstance subsequent to the grant of parole or probation. Here the Government's appeal of sentence is not predicated on a defendant's activity since imposition of the original sentence, and the Government would be unlikely to present evidence of such activity.

Third, the Court argues that Congress could have provided that dangerous special offenders be sentenced to a specified mandatory term that could then be reduced on appeal by the court of appeals. *Ante*, at 142. The Court thus concludes that striking down § 3576 would elevate "form over substance" since Congress could have obtained the same result sought by § 3576 "by a slightly different statute whose constitutionality would be unquestionable." *Ante*, at 142. This is a strange conclusion, for we must review statutes as they are written, not as they might have been written. In any event, the Court's hypothetical legislation is not "slightly different," but substantially different from § 3576: it would create a wholly unprecedented change in the relationship between trial and appellate courts. As long as Congress retains the present court structure in which the sentences of trial courts are final judgments, the "form" as well as the "substance" of the law militate against Government appeals in this situation.

Fourth, and apparently central to the Court's refusal to

accord finality to sentences is its faulty characterization of the sentencing phase of a criminal prosecution. Although the Court acknowledges that the double jeopardy guarantee is at least in part directed at protecting the individual from government oppression and undue embarrassment, expense, anxiety, and insecurity, *Green* v. *United States*, 355 U. S., at 187,[8] it reaches the startling conclusion that "[t]his limited appeal," *ante*, at 136, exposes the defendant to minimal incremental embarrassment and anxiety because "the determination of innocence or guilt . . . is already behind him." *Ibid.* I believe that the Court fundamentally misunderstands the import to the defendant of the sentencing proceeding.

I suggest that most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. This is not to say that the ordeal of trial is not important. And obviously it is the conviction itself which is the predicate for time in prison. But clearly, the defendant does not breathe a sigh of relief once he has been found guilty. Indeed, an overwhelming number of criminal defendants are willing to enter plea bargains in order to keep their time in prison as brief as possible.[9]

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[8] Another purpose of the Double Jeopardy Clause is to prevent "enhancing the possibility that even though innocent, [a defendant] may be found guilty." *Green* v. *United States*, 355 U. S., at 188. A similar analysis applies with respect to sentencing. Repeated attempts at sentencing are as likely to produce an unjustifiably harsh sentence as repeated trials are likely to result in an unwarranted guilty verdict. In both instances, the Government seeks a second opportunity to present evidence it could have presented in the first instance. *Burks* v. *United States*, *supra*, at 11; see 18 U. S. C. § 3576 ("The court of appeals . . . may . . . remand for further sentencing proceedings and imposition of sentence").

[9] For the 12 months ending June 30, 1979, of 32,913 convictions in the United States District Courts, 27,295 were by guilty plea and by plea of *nolo contendere*. Annual Report of the Director of the Administrative Office of the United States Courts 286 (1979).

Under the Court's view, there might be no double jeopardy bar against a Government appeal from the sentence meted out pursuant to a guilty

Surely, the Court cannot believe then that the sentencing phase is merely incidental and that defendants do not suffer acute anxiety. To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase. To pretend otherwise as a reason for holding 18 U. S. C. § 3576 valid is to ignore reality.

The Court's contrary view rests on the circular notion that the defendant "has no expectation of finality in his sentence until the [Government] appeal [pursuant to § 3576] is concluded or the time to appeal has expired." *Ante*, at 136. That is, the very statute which increases and prolongs the defendant's anxiety alleviates it by conditioning his expectations. Logically extended, the Court's reasoning could lead to the conclusion that the Double Jeopardy Clause permits Government appeals from verdicts of acquittal.[10] If the purpose of insulating the verdict of acquittal from further proceedings is, at least in part,[11] out of concern that defendants not be subjected to Government oppression, the Congress could dispose of this objection by a statute authorizing the Government to appeal from verdicts of acquittal. Under the Court's view, such a statute would "charge" the defendant "with knowledge" of its provisions and thus eradicate any expectation of finality in his acquittal.

Finally, the Court attempts to differentiate the finality of acquittals from the finality of sentences through reliance on *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and *Swisher* v. *Brady*, 438 U. S. 204 (1978). Neither decision supports the Court's result. In *Pearce*, the Court allowed the imposi-

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plea. While defendants might bargain with prosecutors over the latter's appellate rights, that possibility is irrelevant for determining the double jeopardy consequences of an appeal from a sentence imposed pursuant to a plea bargain.

[10] The Court, of course, acknowledges that verdicts of acquittal are not appealable.

[11] Finality is also accorded to acquittals to protect against retrials leading to erroneous guilty verdicts. See n. 8, *supra*.

tion of a longer sentence upon retrial following appellate reversal of the defendant's conviction. Our holding rested "ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U. S., at 721. But *Pearce* allowed imposition of a longer sentence because sentencing followed a retrial rather than an appeal.[12] It is the fact of the retrial itself that gives the trial court power to impose a new sentence up to the statutory maximum. As *Pearce* observed, there is a difference between "increases in existing sentences" and "the imposition of wholly new sentences after wholly new trials." *Id.*, at 722. Since the Government does not argue that it is entitled to a new trial, *Pearce* provides no support for enhancement of an already existing sentence on appeal.

The Court's reliance on *Swisher* v. *Brady*, *supra*, is similarly misplaced. There, the Court upheld a Maryland rule allowing juvenile court judges to set aside proposed findings and recommendations of masters and to hold *de novo* proceedings that could ultimately lead to a harsher result for the juveniles. But *Swisher* is critically different from this case because the master under Maryland law had no *authority* to adjudicate facts or to impose a sentence, but could merely

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[12] The reason for allowing retrials following reversal of convictions rests on a legitimate concern for the "sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). Appeals of sentences by the Government pursuant to § 3576 do not implicate the considerations identified in *Tateo*. Section 3576 authorizes appeals of sentences which, in the Government's view, are simply too low. Indeed, as the court below noted, respondent was sentenced to 10 years' imprisonment and had already begun serving his sentence. There was no possibility here, therefore, that respondent would be "granted immunity from punishment." 377 U. S., at 466.

transmit the results of his investigation to the trial judge for the latter's review.[13] Here, by contrast, the federal district judge had full power to conduct a trial to a conclusion of guilt or innocence and then to impose a final sentence upon the defendant if convicted. Merely because § 3576 provides the Government with appellate rights does not convert the judge's imposition of sentence into a mere recommendation.

III

Because the Court has demonstrated no basis for differentiating between the finality of acquittals and the finality of sentences, I submit that a punishment enhanced by an appellate court is an unconstitutional multiple punishment.[14] To conclude otherwise, as the Court does, is to create an exception to basic double jeopardy protection which, if carried to its logical conclusion,[15] might not prevent Congress, on double jeopardy grounds, from authorizing the Government to appeal verdicts of acquittal. Such a result is plainly impermissible under the Double Jeopardy Clause.

I, therefore, dissent.

JUSTICE STEVENS, dissenting.

While I join JUSTICE BRENNAN's dissent, I also note that neither today nor in its opinion in *North Carolina* v. *Pearce*,

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[13] Moreover, in *Swisher*, no evidence could be introduced once the proceeding before the master was terminated, unless the juvenile consented to the introduction of additional evidence. By contrast, § 3576 contemplates additional evidentiary proceedings in connection with appellate review of sentences. See nn. 1 and 8, *supra*.

[14] Similarly, subsequent fact adjudication by the court of appeals or by the district court on remand to it for an evidentiary hearing pursuant to 18 U. S. C. § 3576 is akin to an unconstitutional second trial following a verdict of acquittal.

[15] Under the Court's view, there is no double jeopardy bar to imposition of additional punishment by an appellate court *after* the defendant has completed service of the sentence imposed by the trial court, although such an outcome is not contemplated by § 3576 as presently drafted and would presumably violate due process in any event.

395 U. S. 711 (1969), has the Court adequately responded to Justice Harlan's powerful analysis of the double jeopardy issue in that case. *Id.*, at 744–751 (concurring in part and dissenting in part). Its purported response in *Pearce*—that although the rationale for allowing a more severe punishment after a retrial "has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified," *id.*, at 720–721—clearly has no application to the question whether a more severe sentence may be imposed at the *prosecutor's* behest when the original conviction has *not* been nullified.

The straightforward analysis by Justice Harlan is worthy of emphasis:

> "Every consideration enunciated by the Court in support of the decision in *Green* [v. *United States*, 355 U. S. 184 (1957)] applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See *id.*, at 190. And the concept or fiction of an 'implicit acquittal' of the greater offense, *ibid.*, applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment. . . .
>
> "If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend 'sentences'—as distinguished from 'offenses'—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from

vacating the sentence and then imposing a greater one. See *United States* v. *Benz*, 282 U. S. 304, 306–307 (1931); *Ex parte Lange*, 18 Wall. 163, 168, 173 (1874)." *Id.*, at 746–747.

The Court's response to this analysis is nothing more than a rather wooden extrapolation from a rationale that, however it may be "variously verbalized," *id.*, at 720–721, is wholly irrelevant to the important question presented by this case.

Because I agree with what JUSTICE BRENNAN has written today as well as with what Justice Harlan wrote in 1969, I respectfully dissent.

WEBB'S FABULOUS PHARMACIES, INC., ET AL. *v.* BECKWITH, CLERK OF THE CIRCUIT COURT OF SEMINOLE COUNTY, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 79–1033. Argued October 14, 15, 1980—Decided December 9, 1980

Held: Appellee county's taking as its own, under the authority of a Florida statute, the interest accruing on an interpleader fund deposited in the registry of a county court was a taking violative of the Fifth and Fourteenth Amendments, where a fee, based on the amount of the principal deposited as prescribed by another Florida statute, was also charged for the court clerk's services in receiving the fund into the registry, and where the deposited fund was concededly private and was required by statute in order for the depositor to avail itself of statutory protection from the claims of creditors and others. Neither the Florida Legislature by statute nor the Florida courts by judicial decree may accomplish the result the county sought simply by recharacterizing the principal of the deposited fund as "public money" because it was held temporarily by the court. The earnings of the fund are incidents of ownership of the fund itself and are property just as the fund itself is property. Pp. 159–165.

374 So. 2d 951, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Harvey M. Alper argued the cause and filed a brief for appellants.

Harry A. Stewart argued the cause for appellees. With him on the brief were *Gerald L. Knight* and *Nikki Clayton.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's

services in receiving the fund into the registry. The statute which is the object of the constitutional challenge here is Fla. Stat. §28.33 (1977).[1]

I

On February 12, 1976, appellant Eckerd's of College Park, Inc., entered into an agreement to purchase for $1,812,145.77 substantially all the assets of Webb's Fabulous Pharmacies, Inc. Both Eckerd's and Webb's are Florida corporations. At the closing, Webb's debts appeared to be greater than the purchase price. Accordingly, in order to protect itself and as permitted by the Florida Bulk Transfers Act, Fla. Stat. § 676.106 (4) (1977),[2] Eckerd's filed a complaint of interpleader in the Circuit Court of Seminole County, Fla., inter-

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[1] Section 28.33, enacted as 1973 Fla. Laws, ch. 73-282, § 1, reads in pertinent part:

"The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. . . . Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. . . . *All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court* investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year." (Emphasis supplied.)

[2] Section 676.106 (4), which derives from the Uniform Commercial Code, reads:

"A transferee may within ten days after taking possession of the goods, discharge his obligations under this section by an action in the circuit court for the county where the transferor had his principal place of business in this state interpleading all creditors in the list of creditors required by [§] 676.104. In such event the court shall require the consideration to be deposited into the registry of the court and thereupon shall decree the goods to be free and clear of the claims of such creditors and that such creditors should file their claims with the court."

pleading as defendants both Webb's and Webb's creditors (almost 200 in number) and tendering the purchase price to the court.

Pursuant to § 676.106 (4), the Circuit Court thereupon ordered that the amount tendered be paid to the court's clerk and that the clerk deposit it "in an assignable interest-bearing account at the highest interest." App. 4a. The court specifically reserved decision on the issue of entitlement, as between the clerk and Webb's creditors, to the interest earned on the fund while so deposited, stating that the transfer to the clerk was without prejudice to the creditors' claims to that interest. *Id.*, at 4a–5a. Eckerd's tendered the sum to the clerk on July 13, 1976, *id.*, at 6a, and that official proceeded to make the required investment.

The clerk deducted from the interpleader fund so deposited the sum of $9,228.74 as his fee, prescribed by Fla. Stat. § 28.24 (14) (1977),[3] "for services rendered" for "receiving money into the registry of court." The fee, as the statute directed, was calculated upon the amount placed in the registry, that is, 1% of the first $500, and ½% of the remainder.

On July 5, 1977, almost a year after the tender and payment, the Circuit Court upon its own motion[4] appointed a receiver for Webb's. Among the receiver's stated duties were

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[3] Section 28.24, as then in force, read in pertinent part:

"The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated:

. . . . . .

"(14) For receiving money into the registry of court:

"(a) First $500.00, percent..... 1

"(b) Each subsequent $100.00, percent..... ½"

The statute has since been amended in ways not relevant to the present litigation.

[4] The appellants suggest that the court acted *sua sponte* because of the continuing insistence of the clerk and Seminole County that the county was entitled to the interest being earned on the fund, and to bring the interest period in controversy to an end. Brief for Appellants 10.

the determination of the number and amount of claims filed against the interpleader fund and the preparation and filing with the court of a list of those claims. App. 9a. The receiver filed a motion for an order directing the clerk to deliver the fund to him. *Id.*, at 12a. The motion was granted. *id.*, at 14a, and the principal of the fund, reduced by the $9,228.74 statutory fee and by $40,200 that had been paid out pursuant to court order, was paid to the receiver on July 21. The interest earned on the interpleader fund while it was held by the clerk, but which was not turned over to the receiver, then exceeded $90,000. Interest earned thereafter on the amount so retained brought the total to more than $100,000. Tr. of Oral Arg. 34. It is this aggregate interest that is the subject matter of the present litigation. Appellants make no objection to the clerk's statutory fee of $9,228.74 taken pursuant to § 28.24 (14). Tr. of Oral Arg. 6; Brief for Appellants 6, 9.

The receiver then moved that the court direct the clerk to pay the accumulated interest to the receiver. App. 22a, 26a, 33a. The Circuit Court ruled favorably to the receiver, holding that the clerk "is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court pursuant to the Court's order . . . ; the creditors herein are the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court." *Id.*, at 35a.

Seminole County and the clerk appealed to the Florida District Court of Appeal. That court transferred the cause to the Supreme Court of Florida. The Supreme Court, in a *per curiam* opinion with one justice dissenting in part, ruled that § 28.33 was "constitutional" and reversed the judgment of the Circuit Court. 374 So. 2d 951 (1979). The stated rationale was that a fund so deposited is "considered 'public money'" from the date of deposit until it leaves the account: that "the statute takes only what it creates"; and that "[t]here is no unconstitutional taking because interest earned on the clerk

of the circuit court's registry account is not private property." *Id.*, at 952–953.[5]

Because it had been held elsewhere that a county's appropriation of the interest earned on private funds deposited in court in an interpleader action is an unconstitutional taking, *Sellers* v. *Harris County*, 483 S. W. 2d 242 (Tex. 1972); see *McMillan* v. *Robeson County*, 262 N. C. 413, 137 S. E. 2d 105 (1964), we noted probable jurisdiction. 445 U. S. 925 (1980).

II

It is at once apparent that Florida's statutes would allow respondent Seminole County to exact two tolls while the interpleader fund was held by the clerk of the court. The first

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[5] Although it is not entirely clear that the federal constitutional issue was presented to the Circuit Court, the propriety of the clerk's claim to the interest was clearly raised there as an issue under the Florida Constitution. See p. 6 of the receiver's memorandum in support of his motion for direction to the clerk to remit (p. 77 of the Original Record on Appeal). That memorandum, however, contains at least one reference to "pertinent provisions of the *Florida Constitution* and its Federal counterpart" (emphasis in original), *ibid.*, and there are "due process" arguments beginning at p. 4 of the receiver's reply memorandum. Furthermore, the Circuit Court, in granting the receiver's motion for a *nunc pro tunc* order correcting an omission from the record, specifically stated that § 28.33 and 1973 Fla. Laws, ch. 73–282, "are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case." App. 40a–41a.

In any event, the federal constitutional issue appears to have been raised in the Supreme Court of Florida. See Tr. of Oral Arg. 4. While there is no specific reference to the Federal Constitution in the court's *per curiam* opinion, the court spoke specifically of the receiver's argument that the statute "constitutes either a taking without due process of law or an unlawful tax," 374 So. 2d, at 952, and ruled that there was "no unconstitutional taking." *Id.*, at 953. We are satisfied that the Supreme Court of Florida upheld the statute against both federal and state constitutional challenges. This is a sufficient base for this Court's consideration of the federal issue.

was the statutory fee of $9,228.74 "for services rendered," as § 28.24 recites, by the clerk's office for "receiving money into the registry of court." That fee was determined by the amount of the principal deposited.

The second would be the retention of the amount, in excess of $100,000, consisting of "[a]ll interest accruing from moneys deposited." This toll would be exacted because of § 28.33's provision that the interest "shall be deemed income of the office of the clerk of the circuit court."

An initial reading of § 28.33 might prompt one to conclude that, so far as it concerns entitlement to interest, the statute applies only to interest on funds clearly owned by the county (such as charges for certifications) and that it does not apply to interest on private funds deposited under the direction of another statute. The Florida Supreme Court, however, has read § 28.33 otherwise and has ruled that it applies to interest earned on deposited private funds. That reading of the State's statute is within the Florida court's competency, and we must take the statute as so read and interpreted.

III

The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: "nor shall private property be taken for public use, without just compensation." That prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 239 (1897); *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104, 122 (1978). Our task is to determine whether the second exaction by Seminole County amounted to a "taking"—it was obviously uncompensated—within the Amendment's proscription.

The principal sum deposited in the registry of the court plainly was private property, and was not the property of Seminole County. This is the rule in Florida, *Phipps* v. *Watson,* 108 Fla. 547, 551, 147 So. 234, 235 (1933), as well as

elsewhere. See *Coudert* v. *United States*, 175 U. S. 178 (1899); *Branch* v. *United States*, 100 U. S. 673 (1880); *Sellers* v. *Harris County*, 483 S. W. 2d, at 243. We do not understand that the appellees contend otherwise so far as the fund's principal is concerned.

Appellees submit, Tr. of Oral Arg. 26, 29—and we accept the proposition—that, apart from statute, Florida law does not require that interest be earned on a registry deposit. See 374 So. 2d, at 953. We, of course, also accept the further proposition, pressed upon us by the appellees, that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection. See, for example, *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U. S. 651 (1927); *United States* v. *Willow River Power Co.*, 324 U. S. 499 (1945). See also *Penn Central Transportation Co.* v. *New York City*, *supra*; *Andrus* v. *Allard*, 444 U. S. 51 (1979).

Webb's creditors, however, had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state-created property right to their respective portions of the fund.

It is true, of course, that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. See *Aron* v. *Snyder*, 90

U. S. App. D. C. 325, 327, 196 F. 2d 38, 40, cert. denied, 344 U. S. 854 (1952). That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim. To be sure, § 28.33 establishes as a matter of Florida law that interest is to be earned on deposited funds. But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.

We therefore turn to the interest issue. What would justify the county's retention of that interest? It is obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to § 28.24 and described specifically in that statute as a fee "for services" by the clerk's office. Section 28.33, in contrast, in no way relates the interest of which it speaks to "services rendered." Indeed, if the county were entitled to the interest, its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.

The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal. See, *e. g.*, *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F. 2d 451, 463 (CA5), cert. denied *sub nom. City Trade & Industries, Ltd.* v. *Allahabad Bank, Ltd.*, 404 U. S. 940 (1971); *Murphy* v. *Travelers Ins. Co.*, 534 F. 2d 1155, 1165 (CA5 1976); *In re Brooks & Woodington, Inc.*, 505 F. 2d 794, 799 (CA7 1974); *McMillan* v. *Robeson County*, 262 N. C., at 417, 137 S. E. 2d, at 108; *Sellers* v. *Harris County*, 483 S. W. 2d, at 243; *Southern Oregon Co.* v. *Gage*, 100 Ore. 424, 433, 197 P. 276, 279 (1921); *Board of Law Library*

Trustees v. *Lowery*, 67 Cal. App. 2d 480, 154 P. 2d 719 (1945); *Kiernan* v. *Cleland*, 47 Idaho 200, 273 P. 938 (1929).[6]

The Florida Supreme Court, in ruling contrary to this long established general rule, relied on the words of § 28.33 and then proceeded on the theory that without the statute the clerk would have no authority to invest money held in the registry, that in some way the fund assumes temporarily the status of "public money" from the time it is deposited until it leaves the account, and that the statute "takes only what it creates." Then follows the conclusion that the interest "is not private property." 374 So. 2d, at 952–953.

This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. See, *e. g.*, *Andrus* v. *Allard*, 444 U. S., at 64–68; *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 125–129.

Here, however, Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." *Id.*, at 124. Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

No police power justification is offered for the deprivation. Neither the statute nor appellees suggest any reasonable basis to sustain the taking of the interest earned by the interpleader fund. The county's appropriation of the beneficial use of the

[6] The appellees at oral argument conceded that if coupon bonds, rather than cash, had been deposited in the registry, the coupons would follow the principal and could not be claimed by the county under § 28.33. Tr. of Oral Arg. 31.

fund is analogous to the appropriation of the use of private property in *United States* v. *Causby*, 328 U. S. 256 (1946). There the Court found a "taking" in the Government's use of air space above the claimant's land as part of the flight pattern for military aircraft, thus destroying the use of the land as a chicken farm. "*Causby* emphasized that Government had not 'merely destroyed property [but was] using a part of it for the flight of its planes.'" *Penn Central*, 438 U. S., at 128, quoting from *Causby*, 328 U. S., at 262–263, n. 7.

Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

IV

We hold that under the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others—Seminole County's taking unto itself, under § 28.33 and 1973 Fla. Laws, ch. 73–282, the interest earned

on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders.

The judgment of the Supreme Court of Florida is reversed.

It is so ordered.

UNITED STATES RAILROAD RETIREMENT BOARD *v.* FRITZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 79–870. Argued October 6, 1980—Decided December 9, 1980

The Railroad Retirement Act of 1974 (1974 Act) fundamentally restructured the railroad retirement system under the predecessor 1937 Act, which had included provisions whereby a person who worked for both railroad and nonrailroad employers and who qualified for both railroad retirement and social security benefits received benefits under both systems and an accompanying "windfall" benefit. Although providing that employees who lacked the requisite 10 years of railroad employment to qualify for railroad retirement benefits as of the January 1, 1975, changeover date would not receive any windfall benefits, the 1974 Act preserved windfall benefits for individuals who had retired and were receiving dual benefits as of the changeover date. A provision of the 1974 Act, 45 U. S. C. § 231b (h)(1), also preserved windfall benefits for employees who had qualified for dual benefits as of the changeover date, but who had not yet retired, if they had (1) performed some railroad service in 1974 or (2) had a "current connection" with the railroad industry as of December 31, 1974, or their later retirement date, or (3) completed 25 years of railroad service as of December 31, 1974. The 1974 Act further provided, 45 U. S. C. § 231b (h)(2), that employees who had qualified for railroad benefits as of the changeover date, but lacked a current connection with the railroad industry in 1974 and 25 years of railroad employment, could obtain a lesser amount of windfall benefits if they had qualified for social security benefits as of the year (prior to 1975) they left railroad employment. Appellee and others filed a class action in Federal District Court for a declaratory judgment that § 231b (h) is unconstitutional under the Due Process Clause of the Fifth Amendment, contending that it was irrational for Congress to distinguish between employees who had more than 10 years but less than 25 years of railroad employment simply on the basis of whether they had a "current connection" with the railroad industry as of the changeover date or as of the date of retirement. The District Court certified a plaintiff class of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were permanently insured under the Social Security Act as of December 31, 1974, but who were not eligible to receive any windfall benefits because they had left the

railroad industry before 1974, had no "current connection" with it at the end of 1974, and had less than 25 years of railroad service. The court held that the differentiation based solely on whether an employee was "active" in the railroad business as of 1974 was not "rationally related" to the congressional purposes of insuring the solvency of the railroad retirement system and protecting vested benefits.

Held: The challenged provisions of the 1974 Act do not deny the plaintiff class equal protection of the laws guaranteed by the Fifth Amendment. Pp. 174–179.

(a) When social and economic legislation enacted by Congress is challenged on equal protection grounds as being violative of the Fifth Amendment, the rational-basis standard is the appropriate standard of judicial review. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. This Court will not invalidate on equal protection grounds legislation that it simply deems unwise or unartfully drawn. Cf., *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471; *Jefferson* v. *Hackney*, 406 U. S. 535. Pp. 174–176.

(b) Under such principles, § 231b (h) does not violate the Fifth Amendment. Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits. Congress did not achieve its purpose in a patently arbitrary or irrational way, since it could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of the plaintiff class who were no longer in railroad employment when they became eligible for dual benefits. Furthermore, the "current connection" test is not a patently arbitrary means for determining which employees are "career railroaders," the class for whom the 1974 Act was designed. Pp. 176–178.

(c) Nor is there merit to the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. The language of the statute is clear, and it has been historically assumed that Congress intended what it enacted. P. 179.

Reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined.

STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 180. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 182.

Edwin S. Kneedler argued the cause for appellant. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Geller, Dale G. Zimmerman, Edward S. Hintzke,* and *James E. Lanter.*

Daniel P. Byron argued the cause for appellee. With him on the brief were *Phillip A. Terry* and *Gill Deford.**

JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the Southern District of Indiana held unconstitutional a section of the Railroad Retirement Act of 1974, 88 Stat. 1305, as amended, 45 U. S. C. § 231 *et seq.*, and the United States Railroad Retirement Board has appealed to this Court pursuant to 28 U. S. C. § 1252. We noted probable jurisdiction. 444 U. S. 1069 (1980).

The 1974 Act fundamentally restructured the railroad retirement system. The Act's predecessor statute, adopted in 1937, provided a system of retirement and disability benefits for persons who pursued careers in the railroad industry. Under that statute, a person who worked for both railroad and nonrailroad employers and who qualified for railroad retirement benefits and social security benefits, 42 U. S. C. § 401 *et seq.*, received retirement benefits under both systems and an accompanying "windfall" benefit.[1] The legislative

*Briefs of *amici curiae* urging reversal were filed by *Richard T. Conway* for the National Railway Labor Conference; and by *Edward D. Friedman* for the Railway Labor Executives Association.

Briefs of *amici curiae* urging affirmance were filed by *Jonathan A. Weiss* for Legal Services for the Elderly; and by *Steven F. Bright* and *Gary E. Smith* for T. W. Smith et al.

[1] Under the old Act, as under the new, an employee who worked 10 years in the railroad business qualified for railroad retirement benefits. If the employee also worked outside the railroad industry for a sufficient

history of the 1974 Act shows that the payment of windfall benefits threatened the railroad retirement system with bankruptcy by the year 1981.[2] Congress therefore determined to place the system on a "sound financial basis" by eliminating future accruals of those benefits.[3] Congress also enacted

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enough time to qualify for social security benefits, he qualified for dual benefits. Due to the formula under which those benefits were computed, however, persons who split their employment between railroad and nonrailroad employment received dual benefits in excess of the amount they would have received had they not split their employment. For example, if 10 years of either railroad or nonrailroad employment would produce a monthly benefit of $300, an additional 10 years of the same employment at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to say $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the railroad retirement benefit would also be $300, for a total benefit of $600. The $100 difference in the example constitutes the "windfall" benefit. See generally, S. Rep. No. 93–1163, pp. 2–3 (1974); H. R. Rep. No. 93–1345, pp. 2–3 (1974).

[2] The relevant Committee Reports stated: "Resolution of the so called 'dual benefit' problem is central both to insuring the fiscal soundness of the railroad retirement system and to establishing equitable retirement benefits for all railroad employees." S. Rep. No. 93–1163, *supra*, at 11; H. R. Rep. No. 93–1345, *supra*, at 11. The reason for the problem was that a financial interchange agreement entered into in 1951 between the social security and railroad systems caused the entire cost of the windfall benefits to be borne by the railroad system, not the social security system. The annual drain on the railroad system amounted to approximately $450 million per year, and if it were not for "the problem of dual beneficiaries, the railroad retirement system would be almost completely solvent." S. Rep. No. 93–1163, *supra*, at 8; H. R. Rep. No. 93–1345, *supra*, at 7.

[3] S. Rep. No. 93–1163, *supra*, at 1; H. R. Rep. No. 93–1345, *supra*, at 1. Congress eliminated future accruals of windfall benefits by establishing a two-tier system for benefits. The first tier is measured by what the social security system would pay on the basis of combined railroad and nonrailroad service, while the second tier is based on railroad service alone. However, both tiers are part of the railroad retirement system, rather than the first tier being placed directly under social security, and

various transitional provisions, including a grandfather provision, § 231b (h),[4] which expressly preserved windfall benefits for some classes of employees.

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the benefits actually paid by social security on the basis of nonrailroad employment are deducted so as to eliminate the windfall benefit.

The Railroad Retirement Act of 1974 had its origins in 1970 when Congress created the Commission on Railroad Retirement to study the actuarial soundness of the railroad retirement system. The Commission submitted its report in 1972 and identified "dual benefits and their attendant windfalls" as a principal cause of the system's financial difficulties. It also found that windfall benefits were inequitable, favoring those employees who split their employment over those employees who spent their entire career in the railroad industry. Report of the Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis, H. R. Doc. No. 92–350 (1972). It therefore recommended that future accruals of windfall benefits be eliminated by the establishment of a two-tier system, somewhat similar to the type of system eventually adopted by Congress. It also recommended that "legally vested rights of railroad workers" be preserved. An employee who was fully insured under both the railroad and social security systems as of the changeover date (*i. e.*, by having at least 10 years of railroad employment and the requisite length of social security employment) was deemed to have "legally vested rights."

Following receipt of the Commission's report, Congress requested members of management, labor, and retirees to form a Joint Labor Management Railroad Retirement Negotiating Committee (hereinafter referred to as the Joint Committee) and submit a report, "tak[ing] into account" the recommendations of the Commission. The Joint Committee outlined its proposals in the form of a letter to Congress, dated April 10, 1974. 120 Cong. Rec. 18391–18392 (1974). Although it agreed with the Commission that future accruals of windfall benefits be eliminated, it differed as to the protection to be afforded those already statutorily entitled to benefits and recommended the transitional provisions that were eventually adopted by Congress. A bill embodying those principles was drafted and submitted to Congress, where the relevant committees held lengthy hearings and submitted detailed Reports. See S. Rep. No. 93–1163, *supra;* H. R. Rep. No. 93–1345, *supra.*

[4] Section 3 (h) of the Railroad Retirement Act of 1974, 88 Stat. 1323, 45 U. S. C. § 231b (h), provides in pertinent part:

"(1) The amount of the annuity . . . of an individual who (A) will have (i) rendered service as an employee to an employer, or as an em-

In restructuring the Railroad Retirement Act in 1974, Congress divided employees into various groups. *First*, those employees who lacked the requisite 10 years of railroad employment to qualify for railroad retirement benefits as of January 1, 1975, the changeover date, would have their retirement benefits computed under the new system and would not receive any windfall benefit. *Second*, those individuals already retired and already receiving dual benefits as of the changeover date would have their benefits computed under the old system and would continue to receive a windfall benefit.[5] *Third*, those employees who had qualified for both railroad and social security benefits as of the changeover date, but who had not yet retired as of that date (and thus were

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ployee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2 (a)(1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Society Security Act on December 31, 1974, shall be increased by an amount equal to [the amount of windfall dual benefit he would have received prior to January 1, 1975] . . . .

"(2) The amount of the annuity . . . to an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (1) of this subsection, but (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which he last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the amount . . . [of windfall benefit calculated at time he left the railroad service] . . . ."

The relevant Committee Reports stated that the most "difficult problem" was the "manner in which dual benefits should be phased out on an equitable basis." S. Rep. No. 93–1163, *supra*, at 11; H. R. Rep. No. 93–1345, *supra*, at 11.

[5] 88 Stat. 1353, see note following 45 U. S. C. § 231. The transition provisions in Title II of the bill are not included in the United States Code. The windfall amount for retired employees is preserved by §§ 204 (a)(3) and (4) of the Act.

not yet receiving dual benefits), were entitled to windfall benefits if they had (1) performed some railroad service in 1974 or (2) had a "current connection" with the railroad industry as of December 31, 1974,[6] or (3) completed 25 years of railroad service as of December 31, 1974. 45 U. S. C. § 231b (h)(1). *Fourth*, those employees who had qualified for railroad benefits as of the changeover date, but lacked a current connection with the railroad industry in 1974 and lacked 25 years of railroad employment, could obtain a lesser amount of windfall benefit if they had qualified for social security benefits as of the year (prior to 1975) they left railroad employment. 45 U. S. C. § 231b (h)(2).[7]

Thus, an individual who, as of the changeover date, was unretired and had 10 years of railroad employment and sufficient nonrailroad employment to qualify for social security benefits is eligible for the full windfall amount if he worked for the railroad in 1974 or had a current connection with the railroad as of December 31, 1974, or his later retirement date. But an unretired individual with 24 years of railroad service and sufficient nonrailroad service to qualify for social security benefits is not eligible for a full windfall amount unless he worked for the railroad in 1974, or had a current connection with the railroad as of December 31, 1974, or his later retirement date. And an employee with 10 years of railroad employment who qualified for social security benefits only after

[6] The term "current connection" is defined in 45 U. S. C. § 231 (o) to mean, in general, employment in the railroad industry in 12 of the preceding 30 calendar months.

[7] The amount of the "windfall component" is greater under subsection (1) than under subsection (2) of 45 U. S. C. § 231b (h). The former consists of benefits computed on the basis of social security service through December 31, 1974, while the latter is computed on the basis of social security service only through the year in which the individual left the railroad industry. The difference corresponds to the different dates by which the retired employee must have been permanently insured under the Social Security Act in order to be eligible for any windfall benefit.

leaving the railroad industry will not receive a reduced windfall benefit while an employee who qualified for social security benefits prior to leaving the railroad industry would receive a reduced benefit. It was with these complicated comparisons that Congress wrestled in 1974.

Appellee and others filed this class action in the United States District Court for the Southern District of Indiana, seeking a declaratory judgment that 45 U. S. C. § 231b (h) is unconstitutional under the Due Process Clause of the Fifth Amendment because it irrationally distinguishes between classes of annuitants.[8] The District Court eventually certified a class of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were permanently insured under the Social Security Act as of December 31, 1974, but who were not eligible to receive any "windfall component" because they had left the railroad industry before 1974, had no "current connection" with it at the end of 1974, and had less than 25 years of railroad service.[9] Appellee contended below that it was irrational for Congress to have drawn a distinction between employees who had more than 10 years but less than 25 years of railroad employment simply on the basis of whether they had a "current connection" with the

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[8] Although "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964). Thus, if a federal statute is valid under the equal protection component of the Fifth Amendment, it is perforce valid under the Due Process Clause of that Amendment. *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971).

[9] It is somewhat unclear precisely who is and is not within the class certified by the District Court. By its terms, the class certified by the District Court would appear to include those employees who qualified for reduced windfall benefits under § 231b (h)(2) by reason of their qualifying for social security benefits as of the year they left the railroad industry. It appears, however, that the District Court intended to include in the class only those, like appellee Fritz, who subsequently qualified for social security benefits and who are therefore ineligible for even the reduced windfall benefit.

railroad industry as of the changeover date or as of the date of retirement.

The District Court agreed with appellee that a differentiation based solely on whether an employee was "active" in the railroad business as of 1974 was not "rationally related" to the congressional purposes of insuring the solvency of the railroad retirement system and protecting vested benefits. We disagree and reverse.

The initial issue presented by this case is the appropriate standard of judicial review to be applied when social and economic legislation enacted by Congress is challenged as being violative of the Fifth Amendment to the United States Constitution. There is no claim here that Congress has taken property in violation of the Fifth Amendment, since railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time. *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 575 (1979); *Flemming* v. *Nestor*, 363 U. S. 603, 608–611 (1960). And because the distinctions drawn in § 231b (h) do not burden fundamental constitutional rights or create "suspect" classifications, such as race or national origin, we may put cases involving judicial review of such claims to one side. *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973); *Vance* v. *Bradley*, 440 U. S. 93 (1979).

Despite the narrowness of the issue, this Court in earlier cases has not been altogether consistent in its pronouncements in this area. In *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79 (1911), the Court said that "[w]hen the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed." On the other hand, only nine years later in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920), the Court said that for a classification to be valid under the Equal Protection Clause of the Fourteenth

Amendment it "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."

In more recent years, however, the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn.

Thus in *Dandridge* v. *Williams*, 397 U. S. 471 (1970), the Court rejected a claim that Maryland welfare legislation violated the Equal Protection Clause of the Fourteenth Amendment. It said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 68–70. . . .
>
> . . . "[The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.*, at 485–486.

Of like tenor are *Vance* v. *Bradley*, *supra*, at 97, and *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976). Earlier, in *Flemming* v. *Nestor*, *supra*, at 611, the Court upheld the constitutionality of a social security eligibility provision, saying:

> "[I]t is not within our authority to determine whether the Congressional judgment expressed in that Section is sound or equitable, or whether it comports well or ill with

purposes of the Act. . . . The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

And in a case not dissimilar from the present one, in that the State was forced to make a choice which would undoubtedly seem inequitable to some members of a class, we said:

"Applying the traditional standard of review under [the Equal Protection Clause], we cannot say that Texas' decision to provide somewhat lower welfare benefits for [Aid to Families with Dependent Children] recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it." *Jefferson* v. *Hackney*, 406 U. S. 535, 549 (1972).

Applying those principles to this case, the plain language of § 231b (h) marks the beginning and end of our inquiry.[10]

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[10] This opinion and JUSTICE BRENNAN's dissent cite a number of equal protection cases including *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Morey* v. *Doud*, 354 U. S. 457 (1957); *Flemming* v. *Nestor*, 363 U. S. 603 (1960); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976); *New Orleans* v. *Dukes*, 427 U. S. 297 (1976); *Johnson* v. *Robison*, 415 U. S. 361 (1974); *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *U. S. Dept. of Agriculture* v. *Murry*, 413 U. S. 508 (1973); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); and *James* v. *Strange*, 407

There Congress determined that some of those who in the past received full windfall benefits would not continue to do so. Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits. *New Orleans* v. *Dukes, supra,* at 305.

The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way. The classification here is not arbitrary, says appellant, because it is an attempt to protect the relative equities of employees and to provide benefits to career railroad employees. Congress fully protected, for example, the expectations of those employees who had already retired and those unretired employees who had 25 years of railroad employment. Conversely, Congress denied all windfall benefits to those employees who lacked 10 years of railroad employment. Congress additionally provided windfall benefits, in lesser amount, to those employees with 10 years' railroad employment who had qualified for social security benefits at the time they had left railroad em-

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U. S. 128 (1972). The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion in *Lindsley, supra, Royster Guano Co., supra,* or any of the other cases referred to in this opinion and in the dissenting opinion. But like our predecessors and our successors, we are obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires and in so doing we have no hesitation in asserting, contrary to the dissent, that where social or economic regulations are involved *Dandridge* v. *Williams,* 397 U. S. 471 (1970), and *Jefferson* v. *Hackney,* 406 U. S. 535 (1972), together with this case, state the proper application of the test. The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.

ployment, regardless of a current connection with the industry in 1974 or on their retirement date.

Thus, the only eligible former railroad employees denied full windfall benefits are those, like appellee, who had no statutory entitlement to dual benefits at the time they left the railroad industry, but thereafter became eligible for dual benefits when they subsequently qualified for social security benefits. Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits. Furthermore, the "current connection" test is not a patently arbitrary means for determining which employees are "career railroaders," particularly since the test has been used by Congress elsewhere as an eligibility requirement for retirement benefits.[11] Congress could assume that those who had a current connection with the railroad industry when the Act was passed in 1974, or who returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the Railroad Retirement Act was designed. *Hisquierdo* v. *Hisquierdo*, 439 U. S., at 573.

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[11] The "current connection" test has been used since 1946 as an eligibility requirement for both occupational disability and survivor annuities, 45 U. S. C. §§ 231a (a)(1)(iv), 231a (d)(1) (ch. 709, §§ 203, 205, 213, 60 Stat. 726–735), and it has been used since 1966 in determining eligibility for a supplemental annuity. 45 U. S. C. § 231a (b)(1). (Pub. L. 89–699, § 1, 80 Stat. 1073.)

Appellee contends that the "current connection" test is impermissible because it draws a distinction not on the duration of employment but rather on the time of employment. But this Court has clearly held that Congress may condition eligibility for benefits such as these on the character as well as the duration of an employee's ties to an industry. *Mathews* v. *Diaz*, 426 U. S. 67, 83 (1976).

Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," *Flemming* v. *Nestor*, 363 U. S., at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," *Mathews* v. *Diaz*, 426 U. S. 67, 83–84 (1976), and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Finally, we disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted. To be sure, appellee lost a political battle in which he had a strong interest, but this is neither the first nor the last time that such a result will occur in the legislative forum. What we have said is enough to dispose of the claims that Congress not only failed to accept appellee's argument as to restructuring *in toto*, but that such failure denied him equal protection of the laws guaranteed by the Fifth Amendment.[12]

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[12] As we have recently stated: "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979) (footnote omitted).

For the foregoing reasons, the judgment of the District Court is

Reversed.

JUSTICE STEVENS, concurring in the judgment.

In my opinion JUSTICE BRENNAN's criticism of the Court's approach to this case merits a more thoughtful response than that contained in footnote 10, *ante*, at 176–177. JUSTICE BRENNAN correctly points out that if the analysis of legislative purpose requires only a reading of the statutory language in a disputed provision, and if any "conceivable basis" for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do. JUSTICE BRENNAN is also correct in reminding us that even though the statute is an example of "social and economic legislation," the challenge here is mounted by individuals whose legitimate expectations of receiving a fixed retirement income are being frustrated by, in effect, a breach of a solemn commitment by their Government. When Congress deprives a small class of persons of vested rights that are protected—and, indeed, even enhanced [1]—for others who are in a similar though not identical position, I believe the Constitution requires something more than merely a "conceivable" or a "plausible" explanation for the unequal treatment.

I do not, however, share JUSTICE BRENNAN's conclusion that every statutory classification must further an objective that can be confidently identified as the "actual purpose" of the legislature. Actual purpose is sometimes unknown. Moreover, undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State.[2] I therefore believe that we

[1] The 1974 Act provided increased benefits for spouses, widows, survivors, and early retirees. See 45 U. S. C. § 231c (g).

[2] Compare *Rundlett* v. *Oliver*, 607 F. 2d 495 (CA1 1979) (upholding Maine's statutory rape law), with *Meloon* v. *Helgemoe*, 564 F. 2d 602

must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.

In this case we need not look beyond the actual purpose of the legislature. As is often true, this legislation is the product of multiple and somewhat inconsistent purposes that led to certain compromises. One purpose was to eliminate in the future the benefit that is described by the Court as a "windfall benefit" and by JUSTICE BRENNAN as an "earned dual benefit." That aim was incident to the broader objective of protecting the solvency of the entire railroad retirement program. Two purposes that conflicted somewhat with this broad objective were the purposes of preserving those benefits that had already vested and of increasing the level of payments to beneficiaries whose rights were not otherwise to be changed. As JUSTICE BRENNAN emphasizes, Congress originally intended to protect *all* vested benefits, but it ultimately sacrificed some benefits in the interest of achieving other objectives.

Given these conflicting purposes, I believe the decisive questions are (1) whether Congress can rationally reduce the vested benefits of some employees to improve the solvency of the entire program while simultaneously increasing the benefits of others; and (2) whether, in deciding which vested benefits to reduce, Congress may favor annuitants whose railroad service was more recent than that of disfavored annuitants who had an equal or greater quantum of employment.

(CA1 1977), cert. denied, 436 U. S. 950 (1978) (striking down New Hampshire's statutory rape law).

My answer to both questions is in the affirmative. The congressional purpose to eliminate dual benefits is unquestionably legitimate; that legitimacy is not undermined by the adjustment in the level of remaining benefits in response to inflation in the economy. As for the second question, some hardship—in the form of frustrated long-term expectations—must inevitably result from any reduction in vested benefits. Arguably, therefore, Congress had a duty—and surely it had the right to decide—to eliminate no more vested benefits than necessary to achieve its fiscal purpose. Having made that decision, any distinction it chose within the class of vested beneficiaries would involve a difference of degree rather than a difference in entitlement. I am satisfied that a distinction based upon currency of railroad employment represents an impartial method of identifying that sort of difference. Because retirement plans frequently provide greater benefits for recent retirees than for those who retired years ago—and thus give a greater reward for recent service than for past service of equal duration—the basis for the statutory discrimination is supported by relevant precedent. It follows, in my judgment, that the timing of the employees' railroad service is a "reasonable basis" for the classification as that term is used in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, *ante*, at 174, and *Dandridge* v. *Williams*, 397 U. S. 471, *ante*, at 175, as well as a "ground of difference having a fair and substantial relation to the object of the legislation," as those words are used in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, *ante*, at 174–175.

Accordingly, I concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Appellee Gerhard Fritz represents a class of retired former railroad employees who were statutorily entitled to Railroad Retirement and Social Security benefits, including an overlap herein called the "earned dual benefit," until enactment of

the Railroad Retirement Act of 1974, which divested them of their entitlement to the earned dual benefit. The Act did not affect the entitlements of other railroad employees with equal service in railroad and nonrailroad jobs, who can be distinguished from appellee class only because they worked at least one day for, or retained a "current connection" with, a railroad in 1974.

The only question in this case is whether the equal protection component of the Fifth Amendment [1] bars Congress from allocating pension benefits in this manner. The answer to this question turns in large part on the way in which the strictures of equal protection are conceived by this Court. See *Morey* v. *Doud*, 354 U. S. 457, 472 (1957) (Frankfurter, J., dissenting). The parties agree that the legal standard applicable to this case is the "rational basis" test. The District Court applied this standard below, see Conclusion of Law No. 7, reprinted at App. to Juris. Statement 28a. The Court today purports to apply this standard, but in actuality fails to scrutinize the challenged classification in the manner established by our governing precedents. I suggest that the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review.

I

A legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose. *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312 (1976) (*per curiam*); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*). Perhaps the clearest statement of this Court's present approach to "rational basis" scrutiny may be found in *Johnson* v. *Robison*, 415 U. S. 361 (1974). In considering the constitutionality of limitations on the availability of edu-

[1] See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975).

cational benefits under the Veterans' Readjustment Benefits Act of 1966, eight Members of this Court agreed that

> "our analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws 'does not deny . . . the power to treat different classes of persons in different ways[;] . . . [it denies] the power to legislate that different treatment be accorded the persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."'* " *Id.*, at 374–375 (quoting *Reed* v. *Reed*, 404 U. S. 71, 75–76 (1970), which in turn was quoting *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)) (ellipses and brackets in original) (emphasis supplied).

The enactments of Congress are entitled to a presumption of constitutionality, and the burden rests on those challenging a legislative classification to demonstrate that it does not bear the "fair and substantial relation to the object of the legislation," *ibid.*, required under the Constitution. *Mathews* v. *Lucas*, 427 U. S. 495, 510 (1976).

Nonetheless, the rational-basis standard "is not a toothless one," *ibid.*, and will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys. See, *e. g.*, *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *U. S. Dept. of Agriculture* v. *Murry*, 413 U. S. 508 (1973); *James* v. *Strange*, 407 U. S. 128 (1972). When faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes.

II

The purposes of the Railroad Retirement Act of 1974 are clear, because Congress has commendably stated them in the House and Senate Reports accompanying the Act. A section of the Reports is entitled "Principal Purpose of the Bill." It notes generally that "[t]he bill provides for a complete restructuring of the Railroad Retirement Act of 1937, and will place it on a sound financial basis," [2] and then states:

> "Persons who already have vested rights under both the Railroad Retirement and the Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law." H. R. Rep. No. 93–1345, pp. 1, 2 (1974); S. Rep. No. 93–1163, pp. 1, 2 (1974).[3]

Moreover, Congress explained that this purpose was based on considerations of fairness and the legitimate expectations of the retirees:

> "[A]ny plan to eliminate these dual benefits should include protection of the equities of existing beneficiaries

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[2] Of course, the legitimate governmental interest in restoring the Railroad Retirement system to fiscal soundness does not, in itself, serve to support the challenged classification in this case. At issue is why Congress discriminated among two classes of railroad retirees. The overall interest in saving money is irrelevant to this discrimination.

[3] Several pages later, the Reports again make clear that persons with vested rights to earned dual benefits would retain them:

"It must be recognized that the bill actually takes benefits away from certain railroad employees—those who have not already qualified for Social Security benefits." H. R. Rep. No. 93–1345, at 6; S. Rep. No. 93–1163, at 7.

Only in technical discussions and in the section-by-section analyses do the Reports reflect the actual consequences of the Act on the appellee class. See H. R. Rep. No. 93–1345, at 12, 39–40; S. Rep. No. 93–1163, at 12, 38–39.

The administration also understood the Act to preserve rights to vested earned dual benefits. See H. R. Rep. No. 93–1345, at 81–82 (supplemental report from the Office of Management and Budget).

> and employees with claims upon such benefits. Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved." H. R. No. 93–1345, at 11; S. Rep. No. 93–1163, at 11.

Thus, a "principal purpose" of the Railroad Retirement Act of 1974, as explicitly stated by Congress, was to preserve the vested earned benefits of retirees who had already qualified for them. The classification at issue here, which deprives some retirees of vested dual benefits that they had earned prior to 1974, directly conflicts with Congress' stated purpose. As such, the classification is not only rationally unrelated to the congressional purpose; it is inimical to it.

III

The Court today avoids the conclusion that § 231b (h) must be invalidated by deviating in three ways from traditional rational-basis analysis. First, the Court adopts a tautological approach to statutory purpose, thereby avoiding the necessity for evaluating the relationship between the challenged classification and the legislative purpose. Second, it disregards the actual stated purpose of Congress in favor of a justification which was never suggested by any Representative or Senator, and which in fact conflicts with the stated congressional purpose. Third, it upholds the classification without any analysis of its rational relationship to the identified purpose.

A

The Court states that "the plain language of [45 U. S. C.] § 231b (h) marks the beginning and end of our inquiry." *Ante*, at 176. This statement is strange indeed, for the "plain language" of the statute can tell us only what the classification is; it can tell us nothing about the purpose of the classification, let alone the relationship between the classification

and that purpose. Since § 231b (h) deprives the members of appellee class of their vested earned dual benefits, the Court apparently assumes that Congress must have *intended* that result. But by presuming purpose from result, the Court reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose. But equal protection scrutiny under the rational-basis test requires the courts first to deduce the independent objectives of the statute, usually from statements of purpose and other evidence in the statute and legislative history, and second to analyze whether the challenged classification rationally furthers achievement of those objectives. The Court's tautological approach will not suffice.

B

The Court analyzes the rationality of § 231b (h) in terms of a justification suggested by Government attorneys, but never adopted by Congress. The Court states that it is " 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' " *Ante*, at 179 (quoting *Flemming* v. *Nestor*, 363 U. S. 603, 612 (1960)). In fact, however, equal protection analysis has evolved substantially on this question since *Flemming* was decided. Over the past 10 years, this Court has frequently recognized that the actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test. In *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648, n. 16 (1975), we said:

> "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." (Citing cases.)

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Thus, in *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 17 (1973), this Court stated that a challenged classification will pass muster under "rational basis" scrutiny only if it "rationally furthers some legitimate, *articulated* state purpose" (emphasis added), and in *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S., at 314, we stated that such a classification will be sustained only if it "rationally furthers the purposes *identified by the State*." (Emphasis added.) Moreover, in *Johnson* v. *Robison*, 415 U. S., at 381–382, we upheld a classification on the finding that "[t]hese quantitative and qualitative distinctions, *expressly recognized by Congress*, form a rational basis for Congress' classification . . . ." (Emphasis added.) See also *Califano* v. *Goldfarb*, 430 U. S. 199, 212–213 (1977).

From these cases and others it is clear that this Court will no longer sustain a challenged classification under the rational-basis test merely because Government attorneys can suggest a "conceivable basis" upon which it might be thought rational. The standard we have applied is properly deferential to the Legislative Branch: where Congress has articulated a legitimate governmental objective, and the challenged classification rationally furthers that objective, we must sustain the provision. In other cases, however, the courts must probe more deeply. Where Congress has expressly stated the purpose of a piece of legislation, but where the challenged classification is either irrelevant to or counter to that purpose, we must view any *post hoc* justifications proffered by Government attorneys with skepticism. A challenged classification may be sustained only if it is rationally related to achievement of an *actual* legitimate governmental purpose.

The Court argues that Congress chose to discriminate against appellee for reasons of equity, stating that "Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable

claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits."[4] *Ante*, at 178. This statement turns Congress' assessment of the equities on its head. As I have shown,[5] Congress expressed the view that it would be inequitable to deprive any retirees of any portion of the benefits they had been promised and that they had earned under prior law. See also H. R. Rep. No. 93–1345, pp. 4, 11 (1974); S. Rep. No. 93–1163, pp. 4, 11 (1974); 120 Cong. Rec. 35613 (1974) (statement of Rep. Hudnut); *id.*, at 35614 (statement of Rep. Shuster); *id.*, at 35615 (statement of Rep. Morgan). The Court is unable to cite even one statement in the legislative history by a Representative or Senator that makes the equitable judgment it imputes to Congress. In the entire legislative history of the Act, the only persons to state that the equities justified eliminating appellee's earned dual benefits were representatives of railroad management and labor, whose self-serving interest in bringing about this result destroys any basis for attaching weight to their statements.[6]

The factual findings of the District Court concerning the development of § 231b (h), amply supported by the legislative history, are revealing on this point.[7] In 1970, Congress

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[4] The Court's quoted justification fails on its face to support the challenged classification. Despite the Court's apparent belief to the contrary, some members of the appellee class did "actually acquir[e] statutory entitlement" to dual benefits while still employed in the railroad industry, see *ante*, at 178, but nevertheless were deprived of a portion of those benefits. See § 231b (h)(2). Under the Court's own reasoning, therefore, these persons were arbitrarily and impermissibly treated.

[5] See *supra*, at 185–186.

[6] See discussion following, *infra*.

[7] The Court does not claim that the District Court's factual findings were clearly erroneous, though it does state its disagreement with one lower court conclusion. See *ante*, at 179. Therefore, the factual findings of the District Court govern the litigation in this Court, and in any event, are amply supported by the record.

established a Commission to investigate the actuarial soundness of the Railroad Retirement system and to make recommendations for its reform. See Pub. L. 91–377, 84 Stat. 791. The Commission was composed of one railroad management representative, one railroad labor representative, and three public representatives. The Commission submitted a report in 1972, recommending, *inter alia*, that railroad retirees in the future no longer be permitted to earn full Railroad Retirement and Social Security benefits without offset. The Commission insisted, however, that

> "[i]ndividuals who have vested rights to social security benefits by virtue of permanently or fully insured status, but cannot exercise them because they are not at retirement age under railroad retirement, should be guaranteed an equivalent right in dollar terms to the staff tier portion of their benefits, including vested dual benefits . . . ." Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis, H. R. Doc. No. 92–350, p. 368 (1972).

After receiving the Commission report, Congress asked railroad management and labor representatives to negotiate and submit a bill to restructure the Railroad Retirement system, which should "take into account the specific recommendations of the Commission on Railroad Retirement." Pub. L. 93–69, § 107, 87 Stat. 165. The members of this Joint Labor-Management Negotiating Committee were not appointed by public officials, nor did they represent the interests of the appellee class, who were no longer active railroaders or union members.[8]

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[8] The use of a Joint Labor-Management Negotiating Committee to draft legislation concerning the Railroad Retirement system was not novel. In fact, such a committee drafted the original Railroad Retirement Act of 1937 and several amending Acts since then. See *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 574, n. 3 (1979); Railroad Retirement Act—Supplemental Benefits, Hearings on H. R. 17285 before the Subcommittee on Com-

In an initial proposed restructuring of the system, the Joint Committee devised a means whereby the system deficit could be completely eliminated without depriving retirees of vested earned benefits. See Finding of Fact No. 43, reprinted at App. to Juris. Statement 12a. However, labor representatives demanded that benefits be increased for their current members, the cost to be offset by divesting the appellee class of a portion of the benefits they had earned under prior law. See Findings of Fact Nos. 39, 40, 44, reprinted *id.*, at 11a–12a. As the District Court found:

> "Essentially, the railroad labor negotiators traded off the plaintiff class of beneficiaries to achieve added benefits for their current employees, even though doing so violated the basic Congressional purposes of the negotiations. Furthermore, by sacrificing the plaintiff class, the railroad labor unions breached the duty of fair representation they owed to the plaintiff class, which duty resulted from the labor unions' purported representation of the plaintiff class' interests in the [Joint Committee] negotiations." Finding of Fact No. 44, reprinted *id.*, at 12a–13a.

Congress conducted hearings to consider the Joint Committee's recommendations, but never directed its attention to their effect on persons in appellee class' situation. In fact, the Joint Committee negotiators and Railroad Retirement Board members who testified at congressional hearings perpetuated the inaccurate impression that all retirees with earned vested dual benefits under prior law would retain their benefits unchanged. For example, Mr. William H. Dempsey, chairman of the management negotiators on the Joint

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merce and Finance of the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess., 2–3 (1966); Railroad Retirement, Hearings on H. R. 1362 before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., 448 (1945); Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis, H. R. Doc. No. 92-350, p. 147 (1972).

Committee and principal witness at the hearings, told the committee:

> "[P]rotection [will] be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected." Restructuring of the Railroad Retirement System: Hearings on H. R. 15301 before the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess., 214 (1974).

Accord, *id.*, at 190 (statement of Mr. Dempsey); *id.*, at 194 (statement of Mr. Dempsey); *id.*, at 204 (statement of Rep. Dingell); *id.*, at 213–214 (statement of Mr. Dempsey); *id.*, at 242 (statement of Mr. Dempsey); *id.*, at 248 (statement of Mr. James L. Cowen, Chairman of the Railroad Retirement Board); *id.*, at 249 (statement of Mr. Cowen); *id.*, at 335 (statements of Messrs. Neil P. Speirs and Wythe D. Quarles, Jr., members of the Railroad Retirement Board); *id.*, at 351 (statement of Mr. Speirs).

Most striking is the following colloquy between Representative Dingell and Mr. Dempsey:

> "Mr. DINGELL. Who is going to be adversely affected? Somebody has to get it in the neck on this. Who is going to be that lucky fellow?
>
> "Mr. DEMPSEY. Well, I don't think so really. I think this is the situation in which every one wins. Let me explain.
>
> . . . . .
>
> "Mr. DINGELL. Mr. Dempsey, I see some sleight of hand here but I don't see how it is happening. I applaud it but I would like to understand it. My problem is that you are going to go to a realistic system that is going

> to cost less but pay more in benefits. Now if you have accomplished this, I suggest we should put you in charge of the social security system." *Id.*, at 199, 201.

The Act was passed in the form drafted by the Joint Committee without any amendment relevant to this case.[9]

Of course, a misstatement or several misstatements by witnesses before Congress would not ordinarily lead us to conclude that Congress misapprehended what it was doing. In this instance, however, where complex legislation was drafted by outside parties and Congress relied on them to explain it, where the misstatements are frequent and unrebutted, and where no Member of Congress can be found to have stated the effect of the classification correctly, we are entitled to suspect that Congress may have been misled. As the District Court found: "At no time during the hearings did Congress even give a hint that it understood that the bill by its language eliminated an earned benefit of plaintiff's class." Finding of Fact No. 63, reprinted at App. to Juris. Statement 22a.

Therefore, I do not think that this classification was rationally related to an *actual* governmental purpose.

C

The third way in which the Court has deviated from the principles of rational-basis scrutiny is its failure to analyze

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[9] Congress' unfortunate tendency to pass Railroad Retirement legislation drafted by labor and management representatives without adequate scrutiny was criticized by the Commission on Railroad Retirement in its 1972 report:

"The historical record shows that past policy formulation has not always abided by the key criteria of equity and sound financing. Generally the major provisions of the system have been the product of negotiations between railway labor and the carriers in a bargaining process often reflecting conflicts or the exercise of power in an industry which directly affects the public welfare. The results of this bargaining process have, at times, been less than fully screened by the Federal Government before they were ratified by Congressional action and given Presidential approval." H. R. Doc. No. 92-350, *supra*, at 147.

whether the challenged classification is genuinely related to the purpose identified by the Court. Having suggested that "equitable considerations" underlay the challenged classification—in direct contradiction to Congress' evaluation of those considerations, and in the face of evidence that the classification was the product of private negotiation by interested parties, inadequately examined and understood by Congress—the Court proceeds to accept that suggestion without further analysis.

An unadorned claim of "equitable" considerations is, of course, difficult to assess. It seems to me that before a court may accept a litigant's assertion of "equity," it must inquire what principles of equity or fairness might genuinely support such a judgment. But apparently the Court does not demand such inquiry, for it has failed to address any equitable considerations that might be relevant to the challenged classification.

In my view, the following considerations are of greatest relevance to the equities of this case: (1) contribution to the system; (2) reasonable expectation and reliance; (3) need; and (4) character of service to the railroad industry. With respect to each of these considerations, I would conclude that the members of appellee class have as great an equitable claim to their earned dual benefits as do their more favored co-workers, who remain entitled to their earned dual benefits under § 231b (h).

Contribution to the system. The members of the appellee class worked in the railroad industry for more than 10 but fewer than 25 years, and also worked in nonrailroad jobs for the required number of years for vesting under Social Security—usually 40 quarters. During that time, they contributed to both the Railroad Retirement and Social Security systems, and met all requirements of the law for the vesting of benefits under those systems. In this respect, they are identical to their more favored co-workers, who contributed no more of their earnings to the systems than did appellee

class. On the basis of contributions to the systems, therefore, there is no reason for this discrimination.

Reasonable expectation and reliance. Throughout their working lives, the members of appellee class were assured that they would receive retirement benefits in accordance with the terms of the law as it then stood. See Finding of Fact No. 70, reprinted at App. to Juris. Statement 25a. No less than their more favored co-workers, they chose career paths and made calculations for their retirement based on these assurances. For Congress to change its rules and strip them of these benefits at the time of their retirement seems decidedly inequitable. As the District Court found:

> "The class' reliance on the earned railroad retirement benefit and on the anticipated receipt of full dual benefits is clear from the evidence adduced herein.
>
> . . . . .
>
> "Equally clear from the evidence is the fact that the class' reliance has been to the class' detriment. Class members have been forced to alter substantially their mode of retirement living due to the drastic reduction of Railroad Retirement benefits worked by the 1974 Act. This point was confirmed in the [Joint Committee] negotiations shortly prior to the sending of its report to Congress in April, 1974: 'Mr. Dempsey: . . . The benefit [dual benefit] is one that if we were starting out we would not have at all. So theoretically we would urge that it be out completely as of January 1, 1975. But we cannot do that—we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood.'" Findings of Fact Nos. 70, 71, reprinted *id.*, at 25a–26a.

In fact, this reliance was one of the principal reasons Congress resolved not to disturb the vested earned dual benefits of retirees.[10]

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[10] Cf. *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359,

Need. The appellee class is composed of fixed-income elderly people, no longer capable of re-entering the work force to reacquire benefits once earned but now lost. The average loss to the class members is about $88 per month, no small element in the monthly budget. The record provides no reason to suppose that members of the appellee class are any less likely to be in need than are their co-workers.

Character of service to the railroad industry. Members of the appellee class worked at least 10 years for the railroad industry by 1974, and many of them worked as long as 24 years. Their duration of railroad employment—surely the best measure of their service to the industry—was equal to that of their co-workers. In fact, some members of the class worked *over twice as long* in the railroad industry as did some of those who retained their rights to a dual benefit. Finding of Fact No. 60, reprinted *id.*, at 21a–22a. Admittedly, the members of the appellee class retired from railroad work prior to 1974, but the record shows that many left railroad work involuntarily, not because of a lack of commitment to the industry. Finding of Fact No. 72, reprinted *id.*, at 26a. Moreover, since one purpose of the Railroad Retirement system was to encourage railroad workers to retire early, so as to create positions for younger workers, *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 573–574 (1979), it is hardly fair to fault the appellee class now for having done so.

Even if I were able to accept the notion that Congress considered it equitable to deprive a class of railroad retirees of a portion of their vested earned benefits because they no longer worked for the railroad, I would still consider the means adopted in § 231b (h) irrational.[11] Under this provision, a

374 (1980) (one of Congress' central purposes in passing the Employee Retirement Income Security Act was "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated" (footnote omitted)).

[11] Contrary to the Court's suggestion, this is not a "line-drawing" case, where the Congress must make a division at some point along an ad-

retiree is favored by retention of his full vested earned benefits if he had worked so much as one day for a railroad in 1974. This is a plainly capricious basis for distinguishing among retirees, every one of whom had worked in the industry for at least *10 years:* the fortuity of one day of employment in a particular year should not govern entitlement to benefits earned over a lifetime.[12]

I therefore conclude that the Government's proffered justification of "equitable considerations," accepted without question by the Court, cannot be defended. Rather, as the legislative history repeatedly states, equity and fairness demand that the members of appellee class like their co-workers, retain the vested dual benefits they earned prior to 1974. A conscientious application of rational-basis scrutiny demands, therefore, that § 231b (h) be invalidated.

IV

Equal protection rationality analysis does not empower the courts to second-guess the wisdom of legislative classifications. On this we are agreed, and have been for over 40 years. On the other hand, we are not powerless to probe beneath claims by Government attorneys concerning the means and ends of

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mittedly rationally conceived continuum. See *ante,* at 179. Here, Congress has isolated a particular class of retirees on the basis of a distinction that is utterly irrelevant to any actual or legitimate governmental purpose.

[12] The wholly arbitrary nature of this classification is highlighted by an analysis of the exception in § 231 (h) (2). Under this subsection, some members of the appellee class are entitled to retain a portion of their earned dual benefit, albeit at a reduced level, while the others are divested of the dual benefit altogether. The basis for this added twist is the timing of their qualification for Railroad Retirement and Social Security. Those who qualified for Social Security first retain a portion of their dual benefit; those who qualified for Railroad Retirement first do not. Needless to say, the retirees had no notice at the time that the timing of qualification would make any difference to their entitlement to benefits. This kind of after-the-fact shifting of the rules for retirement benefits has not been justified and cannot be justified.

Congress. Otherwise, we would defer not to the considered judgment of Congress, but to the arguments of litigators. The instant case serves as an example of the unfortunate consequence of such misplaced deference. Because the Court is willing to accept a tautological analysis of congressional purpose, an assertion of "equitable" considerations contrary to the expressed judgment of Congress, and a classification patently unrelated to achievement of the identified purpose, it succeeds in effectuating neither equity nor congressional intent.

I respectfully dissent.

VINCENT *v.* TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79–5962. Argued November 5, 1980—Decided December 9, 1980

Appeal dismissed. Reported below: 586 S. W. 2d 880.

Robert D. McCutcheon, by appointment of the Court, 446 U. S. 934, argued the cause and filed a brief for appellant.

Douglas M. Becker, Assistant Attorney General of Texas, argued the cause for appellee. With him on the brief were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, and *W. Barton Boling* and *Dawn Bruner,* Assistant Attorneys General.

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

THE CHIEF JUSTICE and JUSTICE POWELL would dismiss for want of jurisdiction.

UNITED STATES *v.* WILL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 79-983. Argued October 13, 1980—Decided December 15, 1980*

An interlocking network of federal statutes fixes the compensation of high-level federal officials, including federal judges, and provides for annual cost-of-living adjustments in salary determined in the same way as those for federal employees generally. In four consecutive fiscal years (hereafter Years 1, 2, 3, and 4), Congress, with respect to these high-level officials, enacted statutes to stop or reduce previously authorized cost-of-living increases initially intended to be automatically operative under that statutory scheme. In Years 2 and 3, the statutes became law before the start of the fiscal year, and in Years 1 and 4 became law on or after the first day of the fiscal year. A number of United States District Court Judges (appellees) filed class actions against the United States in District Court, challenging the validity of the statutes under the Compensation Clause of the Constitution, which provides that federal judges shall receive compensation which "shall not be diminished during their Continuance in Office." The District Court granted summary judgments for appellees.

Held:

1. This Court has jurisdiction of the appeals under 28 U. S. C. § 1252, providing for appeals to this Court from judgments holding an Act of Congress unconstitutional in any civil action to which the United States is a party. And the District Court had jurisdiction over the actions under 28 U. S. C. § 1346 (a)(2), which confers on district courts and the Court of Claims concurrent jurisdiction over actions against the United States based on the Constitution when the amount in controversy does not exceed $10,000, none of the individual claims here having been alleged to have exceeded that amount. Pp. 210-211.

2. Title 28 U. S. C. § 455—which requires a federal judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned or where he has a financial interest in the subject matter in controversy or is a party to the proceeding—by reason of the Rule of

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*Together with No. 79-1689, *United States* v. *Will et al.*, also on appeal from the same court.

Necessity does not operate to disqualify all federal judges, including the Justices of this Court, from deciding the issues presented by these cases. Where, under the circumstances of these cases, all Article III judges have an interest in the outcome so that it was not possible to assign a substitute district judge or for the Chief Justice to remit the appeal, as he is authorized to do by statute, to a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455, the common-law Rule of Necessity, under which a judge, even though he has an interest in the case, has a duty to hear and decide the case if it cannot otherwise be heard, prevails over the disqualification standards of § 455. Far from promoting § 455's purpose of reaching disqualification of an individual judge when there is another to whom the case may be assigned, failure to apply the Rule of Necessity in these cases would have a contrary effect by denying some litigants their right to a forum. And the public might be denied resolution of the crucial matter involved if first the District Judge and now all the Justices of this Court were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented. Pp. 211–217.

3. The statutes in question in Years 1 and 4, but not in Years 2 and 3, violated the Compensation Clause. Pp. 217–230.

(a) In each of the four years in question, Congress intended in effect to repeal or postpone previously authorized salary increases for federal judges, not simply to consign such increases to the fiscal limbo of an account due but not payable. Pp. 221–224.

(b) Since the statute applying to Year 1 became law on the first day of the fiscal year, by which time the salary increases already had taken effect, it purported to repeal a salary increase already in force and thus "diminished" the compensation of federal judges. That the statute included in the salary "freeze" other federal officials who are not protected by the Compensation Clause did not insulate a direct diminution in judges' salaries from the clear mandate of that Clause. Pp. 224–226.

(c) But the statutes applying to Years 2 and 3 became law before the scheduled salary increases for federal judges had taken effect, *i. e.*, before they had become a part of the compensation due Article III judges, and hence in no sense diminished the compensation such judges were receiving. Pp. 226–229.

(d) Even though the statute applying to Year 4 referred only to "executive employees, which includes Members of Congress," and did not expressly mention judges, it appears that Congress intended to include Article III judges. Accordingly, where such statute, similarly to the statute applying to Year 1, purported to revoke an increase in

judges' compensation after the statutes granting the increase had taken effect, it violated the Compensation Clause. Pp. 229–230.

No. 79–983, 478 F. Supp. 621, and No. 79–1689, affirmed in part, reversed in part, and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except BLACKMUN, J., who took no part in the decision of the cases.

Acting Solicitor General Geller argued the cause for the United States. With him on the briefs were *Assistant Attorney General Daniel, Mark I. Levy, Anthony J. Steinmeyer, Neil H. Koslowe,* and *Mark N. Mutterperl.*

Kevin M. Forde argued the cause for appellees. With him on the brief was *Richard J. Prendergast.*†

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These appeals present the questions whether under the Compensation Clause, Art. III, § 1, Congress may repeal or modify a statutorily defined formula for annual cost-of-living increases in the compensation of federal judges, and, if so, whether it must act before the particular increases take effect.

I

Congress has enacted an interlocking network of statutes to fix the compensation of high-level officials in the Executive, Legislative, and Judicial Branches, including federal judges. It provides for quadrennial review of overall salary levels and annual cost-of-living adjustments determined in the same fashion as those for federal employees generally. In four consecutive fiscal years, Congress, with respect to these high-level

†Briefs of *amici curiae* urging affirmance in both cases were filed by *Leonard F. Janofsky, John A. Sutro, Francis R. Kirkham,* and *C. Douglas Floyd* for the American Bar Association; by *Richard William Austin* and *John F. McCarthy* for the Chicago Bar Association; and by *Nancy Y. Bekavac* and *Richard Coleman* for the Los Angeles County Bar Association.

Executive Branch, Legislative, and Judicial salaries, enacted statutes to stop or to reduce previously authorized cost-of-living increases initially intended to be automatically operative under that statutory scheme, once the Executive had determined the amount. In two of these years, the legislation was signed by the President and became law before the start of the fiscal year; in the other two years, on or after the first day of the fiscal year.

A

The salaries of high-level Executive, Legislative, and Judicial officials are set under the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 642, as amended, 2 U. S. C. §§ 351–361 (1976 ed. and Supp. III). The Salary Act provides for a quadrennial review, starting in 1969, of these officials' compensation. A Commission on Executive, Legislative, and Judicial Salaries periodically examines the salary levels for these positions in relation to one another and to the General Schedule (GS), the matrix of grades and steps that determines the salaries of most federal employees. Its recommendations are submitted to the President, who in turn submits that report with his recommendations to Congress in the next budget. Each House of Congress must vote on the President's proposal within 60 days. If both Houses approve, the adjustment takes effect at the start of the first pay period beginning 30 days thereafter.[1]

In 1975, Congress adopted the Executive Salary Cost-of-Living Adjustment Act, Pub. L. 94–82, 89 Stat. 419. The Adjustment Act subjects the salaries covered by the Salary Act to the same annual adjustment made in the General Schedule under the Federal Pay Comparability Act of 1970, 5 U. S. C. §§ 5305–5306. The Comparability Act requires that each year the President designate an agent to compare federal salaries to data on private-sector salaries compiled by

[1] The Salary Act, as amended, does not expressly prescribe what occurs if either House of Congress disapproves. See 2 U. S. C. § 359 (1976 ed., Supp. III).

the Bureau of Labor Statistics. The agent must undertake certain steps in his investigation and, ultimately, submit a report to the President recommending adjustments as deemed appropriate to bring federal employees' salaries in line with prevailing rates in the private sector. A separate Advisory Committee on Federal Pay then reviews that report and makes its own independent recommendation. Thereafter, the President issues an order adjusting the salaries of federal employees and submits a report to Congress listing the overall percentage of the adjustment and including the reports and recommendations submitted to him on the subject. If the President believes that economic conditions or conditions of national emergency make the planned adjustment inappropriate, he may submit to Congress before September 1 an alternative plan for adjusting federal employees' salaries. This alternative plan controls unless within 30 days of continuous legislative session either House of Congress adopts a resolution disapproving of the President's proposed plan. If one House disapproves, the agent's recommendation governs. The increases take effect with the start of the first pay period starting on or after the beginning of the federal fiscal year on October 1.

This complex web of base salaries adjusted annually for civil service employees and again quadrennially for higher-rank positions has led to the following statutory definition of a United States district judge's compensation:

> "Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U. S. C. 351–361), as adjusted by section 461 of this title." 28 U. S. C. § 135.

Similarly phrased statutes apply to all other Article III judges.[2] Title 28 U. S. C. § 461 in turn provides that the an-

[2] See 28 U. S. C. § 5 (the Chief Justice and each Associate Justice of the Supreme Court); 28 U. S. C. § 44 (d) (circuit judges); 28 U. S. C.

nual GS adjustment, rounded to the nearest multiple of $100, shall apply to salaries subject to that section, effective at the start of the next pay period. Compensation of judges is set at an annual figure and paid monthly, with each pay period coinciding with the calendar month. See 5 U. S. C. § 5505. Accordingly, any annual change in salary under the Adjustment Act takes effect at the beginning of October, the start of the fiscal year.

B

In October 1975, GS salaries were increased by an average of 5% under the terms of the Comparability Act. Federal judges and the other officials covered by the Adjustment Act received similar increases. In each of the following four years, however, Congress adopted a statute that altered the application of the Adjustment Act for the officials of the three branches subject to it. To avoid the confusion generated by a fiscal year's having a number different from the calendar year in which it begins, we refer to these as Years 1, 2, 3, and 4. We turn now to the specific actions taken for each of the four years in question.

Year 1

In October 1976, GS salaries were increased by an average of 4.8% under the procedures of the Comparability Act outlined earlier. On October 1, the first day of the new fiscal year and the first day of the relevant pay period, the President signed the Legislative Branch Appropriation Act, 1977, Pub. L. 94–440, 90 Stat. 1439. Title II of that statute provided:

> "[N]one of the funds contained in this Act shall be used to increase salaries of Members of the House of Representatives . . . . No part of the funds appropriated in

§ 173 (Court of Claims); 28 U. S. C. § 213 (Court of Customs and Patent Appeals); 28 U. S. C. § 252 (Court of International Trade (formerly Customs Court)).

> this Act or any other Act shall be used to pay the salary of an individual in a position or office referred to in section 225 (f) of the Federal Salary Act of 1967, as amended (2 U. S. C. 356), including a Delegate to the House of Representatives, at a rate which exceeds the salary rate in effect on September 30, 1976, for such position or office . . . ."

By virtue of the reference to the Salary Act, this statute applied to federal judges; its import, therefore, was to prohibit paying the 4.8% raise on October 1, 1976, under the Adjustment Act to federal judges, as well as Members of Congress and high-level officials in the Executive Branch.

In March 1977, Members of Congress, federal judges, and high-ranking employees in the Executive Branch received raises pursuant to the quadrennial review under the Salary Act. The salary of a United States district judge, for example, increased to $54,500; circuit judges and special appellate judges, to $57,500; Associate Justices of the Supreme Court, to $72,000. 42 Fed. Reg. 10297 (1977).[3]

Year 2

In October 1977, GS salaries, which generally are not subject to the quadrennial review under the Salary Act, were increased an average of 7.1% under the Comparability Act. On July 11, 1977, the President signed Pub. L. 95–66, 91 Stat. 270, which provided:

> "[T]he first adjustment which, but for this Act, would be made after the date of enactment of this Act under the following provisions of law in the salary or rate of pay

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[3] These amounts exceeded the levels these salaries would have achieved had Congress left in effect the 4.8% increase from October 1, 1976. Therefore, appellees' complaint in No. 79–983 challenged the statute in Year 1 only insofar as it affected judicial compensation from October 1, 1976, to March 1, 1977. See n. 6, *infra*.

of positions or individuals to which such provisions apply [the 7.1% in October 1977], shall not take effect:

. . . . . .

"(3) section 461 of title 28, United States Code, relating to comparability adjustments in the salary and rate of pay of justices, judges, commissioners, and referees . . . ."

Parallel subdivisions applied to the other officials under the Salary Act. According to the House Report on this measure, an Adjustment Act increase would be inappropriate following the Comparability Act increase earlier in the same calendar year. H. R. Rep. No. 95–458, p. 2 (1977).[4] The effect of this statute was to nullify the contemplated 7.1% increase for these high-level executive employees, Members of Congress, and federal judges.

Year 3

For the fiscal year beginning October 1, 1978, the President approved the recommendation to increase GS salaries an average of 5.5%. On September 30, 1978, the final day of the preceding fiscal year, however, the President signed the Legislative Branch Appropriation Act, 1979, Pub. L. 95–391, 92 Stat. 763. Section 304 (a) of that Act stated:

"No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978 . . . ."

[4] See also 123 Cong. Rec. 7126 (1977) (remarks of Sen. Scott) ("prevents people . . . from receiving two pay raises in 1 year"); *id.*, at 21121 (remarks of Rep. Solarz) ("individuals who have already received one increase during the course of the current year should not be entitled to receive a second increase as well"); *infra*, at 222, and n. 24.

The effect of this provision was to prohibit paying the 5.5% increase authorized by the Adjustment Act for the fiscal year beginning October 1, 1978.

Year 4

For the fiscal year beginning October 1, 1979, the President's statutory agent transmitted a recommendation for an average increase of 10.41%. However, on August 31, the President invoked his power under the Comparability Act to alter this rate; he reduced the proposed increase to 7% from the 10.41% recommended. These increases, the Government concedes, took effect on October 1, 1979. Moreover, because the September 30, 1978, statute (Year 3) prohibited paying the 5.5% increase only during fiscal year 1979, that increase took effect as well; along with the 7% adjustment, this brought the total to 12.9%.[5] Nevertheless, the Government now contends that this increase was in effect for only 11 days, since on October 12, the President signed Pub. L. 96–86, 93 Stat. 656. Section 101 (c) of this statute stated, in relevant part:

> "For fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year."

None of the appellees have exercised the statutory option to accept the 5.5% increase pursuant to the final clause of this statute; in terms that statute provides such acceptance of the 5.5% operates as a waiver of all claims to rates higher than

[5] The 7% increase was computed on the salary levels as they stood after the addition of the 5.5% increase deferred from Year 3. The compounding of the two increases means that the employees affected felt a combined increase of 12.9%. This explains the additional 0.4%.

the 5.5%. The Government concedes the 5.5% increase has continued in effect.

C

On February 7, 1978, 13 United States District Judges filed an action (No. 79–983 in this Court) in the District Court for the Northern District of Illinois. The complaint, which named the United States as defendant, challenged the validity of the statutes in Years 1 and 2 under the Compensation Clause, U. S. Const., Art. III, § 1.[6] The plaintiff judges were certified as representatives of two classes of Article III judges, the classes defined with reference to Years 1 and 2.[7] The Government, while not opposing certification of the classes, defended the validity of both statutes.

In an opinion filed August 29, 1979, the District Court granted summary judgment for the plaintiffs, appellees here. 478 F. Supp. 621. A corresponding judgment order was entered September 24. On appeal by the Government, we postponed decision on jurisdiction to the hearing on the merits and directed the parties to address the effect of 28 U. S. C. § 455, if any, on the jurisdiction of the District Court and this Court. 444 U. S. 1068 (1980).

No. 79–1689 comes to us from a similar complaint filed in the United States District Court for the Northern District of

[6] The plaintiffs challenged the statute in Year 1 only insofar as it applied to compensation earned from October 1, 1976, until March 1, 1977, the date the quadrennial increase under the Comparability Act took effect. See n. 3, *supra*.

[7] For Year 1, the class was defined as all Article III judges serving during part or all of the period October 1, 1976, to March 1, 1977, the date the quadrennial increase under the Comparability Act took effect. See n. 6, *supra*. For Year 2, the class was defined as all Article III judges taking office prior to July 11, 1977, the date the statute was passed, and continuing in office after October 1, 1977, the date the Adjustment Act increase was due to take effect.

The case was referred to a newly appointed member of the District Court who had taken office after October 1, 1977, and thus was not a member of either class.

Illinois on October 19, 1979, after the District Court had entered judgment in No. 79-983. At issue this time were the statutes in Years 3 and 4. The same 13 judges, joined by one other, again sought to represent two classes of Article III judges defined by the years.[8] The United States is defendant. The case was referred to the same member of the District Court who had presided over the proceedings in No. 79-983.

On January 31, 1980, the District Court entered an order certifying the classes and granting summary judgment for the plaintiffs, appellees in No. 79-1689. Based on its decision in No. 79-983, the court held that the statute in Year 3 violated the Compensation Clause. The court noted with respect to Year 4 that the relevant statute referred only to "executive employees." It then held that while it was doubtful Congress intended the statute to apply to judges, the statute would be unconstitutional if Congress did so intend. In either case, the Adjustment Act increase for Year 4 took effect. Judgment for appellees was formally entered February 12. On the Government's appeal to this Court, we postponed consideration of jurisdiction to the merits and consolidated this case with No. 79-983 for briefing and oral argument. 447 U. S. 919 (1980).

II

A

Jurisdiction

Although it is clear that the District Judge and all Justices of this Court have an interest in the outcome of these cases, there is no doubt whatever as to this Court's jurisdiction

[8] For Year 3, the class was defined as all Article III judges in office on October 1, 1978, the date of the scheduled Adjustment Act increase, and continuing in office thereafter. For Year 4, the class was defined as all Article III judges in office on October 1, 1979, the date the Adjustment Act increase took effect, and continuing in office through October 12, 1979, the date the Year 4 statute was signed.

under 28 U. S. C. § 1252 [9] or that of the District Court under 28 U. S. C. § 1346 (a)(2) (1976 ed., Supp. III).[10] Section 455 of Title 28 [11] neither expressly nor by implication purports to deal with jurisdiction. On its face § 455 provides for disqualification of individual judges under specified circumstances; it does not affect the jurisdiction of a court. Nothing in the text or the history of § 455 suggests that Congress intended, by that section, to amend the vast array of statutes conferring jurisdiction over certain matters on various federal courts.

B

Disqualification

Jurisdiction being clear, our next inquiry is whether 28 U. S. C. § 455 or traditional judicial canons [12] operate to dis-

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[9] This section provides in part:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

[10] This provision confers on the district courts and the Court of Claims concurrent jurisdiction over actions against the United States based on the Constitution when the amount in controversy does not exceed $10,000. The complaints in both No. 79-983 and No. 79-1689 state that the claims of individual members of the classes do not exceed $10,000, an allegation the Government has not disputed. See App. 9a, 62a.

[11] This section provides in relevant part:

"(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

. . . . . .

"(4) He knows that he . . . has a financial interest in the subject matter in controversy . . . ;

"(5) He . . .

"(i) Is a party to the proceeding . . . ."

[12] See, *e. g.*, ABA, Code of Judicial Conduct, Canon 3 (C).

qualify all United States judges, including the Justices of this Court, from deciding these issues. This threshold question reaches us with both the Government and the appellees in full agreement that § 455 did not require the District Judge, and does not now require each Justice of this Court, to disqualify himself. Rather, they agree the ancient Rule of Necessity prevails over the disqualification standards of § 455. Notwithstanding this concurrence of views resulting from the Government's concession, the sensitivity of the issues leads us to address the applicability of § 455 with the same degree of care and attention we would employ if the Government asserted that the District Court lacked jurisdiction or that § 455 mandates disqualification of all judges and Justices without exception.

In federal courts generally, when an individual judge is disqualified from a particular case by reason of § 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified. In the cases now before us, however, all Article III judges have an interest in the outcome; assignment of a substitute District Judge was not possible. And in this Court, when one or more Justices are recused but a statutory quorum of six Justices eligible to act remains available, see 28 U. S. C. § 1, the Court may continue to hear the case. Even if all Justices are disqualified in a particular case under § 455, 28 U. S. C. § 2109 authorizes the Chief Justice to remit a direct appeal to the Court of Appeals for final decision by judges not so disqualified.[13]

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[13] Section 2109 provides, in relevant part:

"If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three

However, in the highly unusual setting of these cases, even with the authority to assign other federal judges to sit temporarily under 28 U. S. C. §§ 291–296 (1976 ed. and Supp. III), it is not possible to convene a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455. It was precisely considerations of this kind that gave rise to the Rule of Necessity, a well-settled principle at common law that, as Pollack put it, "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929).

C

Rule of Necessity

The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. Y. B. Hil.

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circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title."

The second paragraph of the section provides that, in all other cases when a quorum of qualified Justices is unable to sit, the Court shall enter an order affirming the judgment extant, which shall have the precedential effect of an affirmance by an equally divided Court.

The original version of this section was designed to ensure that the parties in antitrust and Interstate Commerce Commission cases, which at that time could be appealed directly to this Court, would always have some form of appellate review. See H. R. Rep. No. 1317, 78th Cong., 2d Sess., 2 (1944). Congress broadened this right in the 1948 revision of Title 28 to include all cases of direct review. H. R. Rep. No. 308, 80th Cong., 1st Sess., A175–A176 (1947).

8 Hen. VI, f. 19, pl. 6.[14] Early cases in this country confirmed the vitality of the Rule.[15]

The Rule of Necessity has been consistently applied in this country in both state and federal courts. In *State ex rel. Mitchell* v. *Sage Stores Co.*, 157 Kan. 622, 143 P. 2d 652 (1943), the Supreme Court of Kansas observed:

> "[I]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *Id.*, at 629, 143 P. 2d, at 656.

Similarly, the Supreme Court of Pennsylvania held:

> "The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be." *Philadelphia* v. *Fox*, 64 Pa. 169, 185 (1870).

Other state[16] and federal[17] courts also have recognized the Rule.

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[14] Rolle's Abridgment summarized this holding as follows: "If an action is sued in the bench against all the Judges there, then by necessity they shall be their own Judges." 2 H. Rolle, An Abridgment of Many Cases and Resolutions at Common Law 93 (1668) (translation).

[15] For example, in *Mooers* v. *White*, 6 Johns. Ch. 360 (N. Y. 1822), Chancellor Kent continued to sit despite his brother-in-law's being a party; New York law made no provision for a substitute chancellor. See *In re Leefe*, 2 Barb. Ch. 39 (N. Y. 1846). See also cases cited in Annot., 39 A. L. R. 1476 (1925).

[16] *E. g.*, *Moulton* v. *Byrd*, 224 Ala. 403, 140 So. 384 (1932); *Olson* v. *Cory*, 26 Cal. 3d 672, 609 P. 2d 991 (1980); *Nellius* v. *Stiftel*, 402 A. 2d 359 (Del. 1978); *Dacey* v. *Connecticut Bar Assn.*, 170 Conn. 520, 368 A. 2d 125 (1976); *Wheeler* v. *Board of Trustees of Fargo Consol. School*

[*Footnote 17 is on p. 215*]

The concept of the absolute duty of judges to hear and decide cases within their jurisdiction revealed in Pollack, *supra*, and *Philadelphia* v. *Fox*, *supra*, is reflected in decisions of this Court. Our earlier cases dealing with the Compensation Clause did not directly involve the compensation of Justices or name them as parties, and no express reference to the Rule is found. See, *e. g.*, *O'Malley* v. *Woodrough*, 307 U. S. 277 (1939); *O'Donoghue* v. *United States*, 289 U. S. 516 (1933); *Evans* v. *Gore*, 253 U. S. 245 (1920). In *Evans*, however, an action brought by an individual judge in his own behalf, the Court by clear implication dealt with the Rule:

> "Because of the individual relation of the members of this court to the question . . . , we cannot but regret that its solution falls to us . . . . But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go." *Id.*, at 247–248.[18]

Dist., 200 Ga. 323, 37 S. E. 2d 322 (1946); *Schward* v. *Ariyoshi*, 57 Haw. 348, 555 P. 2d 1329 (1976); *Higer* v. *Hansen*, 67 Idaho 45, 170 P. 2d 411 (1946); *Gordy* v. *Dennis*, 176 Md. 106, 5 A. 2d 69 (1936); *State ex rel. Gardner* v. *Holm*, 241 Minn. 125, 62 N. W. 2d 52 (1954); *State ex rel. West Jersey Traction Co.* v. *Board of Public Works*, 56 N. J. L. 431, 29 A. 163 (1894); *Long* v. *Watts*, 183 N. C. 99, 110 S. E. 765 (1922); *First American Bank & Trust Co.* v. *Ellwein*, 221 N. W. 2d 509 (N. D.), cert. denied, 419 U. S. 1026 (1974); *McCoy* v. *Handlin*, 35 S. D. 487, 153 N. W. 361 (1915); *Alamo Title Co.* v. *San Antonio Bar Assn.*, 360 S. W. 2d 814 (Tex. Civ. App.), writ ref'd, no rev. error (Tex. 1962).

[17] *E. g.*, *Atkins* v. *United States*, 214 Ct. Cl. 186, 556 F. 2d 1028 (1977), cert. denied, 434 U. S. 1009 (1978); *Pilla* v. *American Bar Assn.*, 542 F. 2d 56 (CA8 1976); *Brinkley* v. *Hassig*, 83 F. 2d 351 (CA10 1936); *United States* v. *Corrigan*, 401 F. Supp. 795 (Wyo. 1975).

[18] *O'Malley* cast doubt on the substantive holding of *Evans*, see n. 31, *infra*, but the fact that the Court reached the issue indicates that it did not question this aspect of the *Evans* opinion.

It would appear, therefore, that this Court so took for granted the continuing validity of the Rule of Necessity that no express reference to it or extended discussion of it was needed.[19]

D

Limited Purpose of Section 455

The objective of § 455 was to deal with the reality of a positive disqualification by reason of an interest or the appearance of possible bias. The House and Senate Reports on § 455 reflect a constant assumption that upon disqualification of a particular judge, another would be assigned to the case. For example:

> "[I]f there is [any] reasonable factual basis for doubting the judge's impartiality, he should disqualify himself *and let another judge preside over the case.*" S. Rep. No. 93–419, p. 5 (1973) (emphasis added); H. R. Rep. No. 93–1453, p. 5 (1973) (emphasis added).

The Reports of the two Houses continued:

> "The statutes contain ample authority for chief judges *to assign other judges* to replace either a circuit or district court judge who become disqualified [under § 455]." S. Rep. No. 93–419, *supra*, at 7 (emphasis added); H. R. Rep. No. 93–1453, *supra*, at 7 (emphasis added).

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[19] In another, not unrelated context, Chief Justice Marshall's exposition in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), could well have been the explanation of the Rule of Necessity; he wrote that a court "must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them." *Id.*, at 404 (emphasis added).

The congressional purpose so clearly expressed in the Reports gives no hint of altering the ancient Rule of Necessity, a doctrine that had not been questioned under prior judicial disqualification statutes.[20] The declared purpose of § 455 is to guarantee litigants a fair forum in which they can pursue their claims. Far from promoting this purpose, failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum. The availability of a forum becomes especially important in these cases. As this Court has observed elsewhere, the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary. *Evans* v. *Gore, supra,* at 253. The public might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented. On balance, the public interest would not be served by requiring disqualification under § 455.

We therefore hold that § 455 was not intended by Congress to alter the time-honored Rule of Necessity. And we would not casually infer that the Legislative and Executive Branches sought by the enactment of § 455 to foreclose federal courts from exercising "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison,* 1 Cranch 137, 177 (1803).

III

The Compensation Clause

The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A

[20] See Act of Mar. 3, 1911, ch. 231, §§ 20, 21, 36 Stat. 1090 (current version at 28 U. S. C. §§ 144, 455 (1976 ed. and Supp. III)). This statute applied only to district judges, but its existence demonstrates that the Rule of Necessity has continued in force side by side with statutory disqualification standards.

Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government. Our Constitution promotes that independence specifically by providing:

> "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1.

Hamilton, in The Federalist No. 79, p. 491 (1818) (emphasis deleted), emphasized the importance of protecting judicial compensation:

> "In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

The relationship of judges' compensation to their independence was by no means a new idea initiated by the authors of the Constitution. The Act of Settlement in 1701, designed to correct abuses prevalent under the reign of the Stuart Kings, includes a provision that, upon the accession of the successor to then Princess Anne,

> "Judges Commissions be made *Quamdiu se bene gesserint* [during good behavior], and their Salaries ascertained and established . . . ." 12 & 13 Will. III, ch. 2, § III, cl. 7 (1701).

This English statute is the earliest legislative acknowledgment that control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government. Later, Parliament passed, and the King assented to, a statute implementing the Act of Settlement providing that a judge's salary would not be decreased "so long as the Patents and Commissions of them, or any of them respectively, shall

continue and remain in force." 1 Geo. III, ch. 23, § III (1760). These two statutes were designed "to maintain both the dignity and independence of the judges." 1 W. Blackstone, Commentaries *267.

Originally, these same protections applied to colonial judges as well. In 1761, however, the King converted the tenure of colonial judges to service at his pleasure.[21] The interference this change brought to the administration of justice in the Colonies soon became one of the major objections voiced against the Crown. Indeed, the Declaration of Independence, in listing the grievances against the King, complained:

> "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

Independence won, the colonists did not forget the reasons that caused them to separate from the Mother Country. Thus, when the Framers met in Philadelphia in 1787 to draft our organic law, they made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution and separation.

Madison's notes of the Constitutional Convention reveal that the draftsmen first reached a tentative arrangement whereby the Congress could neither increase nor decrease the compensation of judges. Later, Gouverneur Morris succeeded in striking the prohibition on increases; with others, he believed the Congress should be at liberty to raise salaries to meet such contingencies as inflation, a phenomenon known in that day as it is in ours. Madison opposed the change on the ground judges might tend to defer unduly to the Congress when that body was considering pay increases.

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[21] See, *e. g.*, W. Carpenter, Judicial Tenure in the United States 2-3 (1918).

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The concern for the ravages of inflation is revealed in Madison's comment:

> "The variations in the value of money, may be guarded agst. by taking for a standard wheat or some other thing of permanent value. 2 M. Farrand, The Records of the Federal Convention of 1787, p. 45 (1911).

Morris criticized the proposal for overlooking changes in the state of the economy; the value of wheat may change, he said, and leave the judges undercompensated. The Convention finally adopted Morris' motion to allow increases by the Congress, thereby accepting a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed.[22] As Hamilton later explained:

> "It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant to-day might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse." The Federalist No. 79, pp. 491–492 (1818).

This Court has recognized that the Compensation Clause

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[22] The rejection of Madison's suggestion of tying judicial salaries to the price of some commodity may have arisen from colonial Virginia's unsatisfactory experience with a similar scheme for paying the clergy with a set amount of tobacco. See generally L. Gipson, The Coming of the Revolution, 1763–1775, pp. 46–54 (1954); Scott, The Constitutional Aspects of the "Parson's Cause," 31 Pol. Sci. Q. 558 (1916). Although ultimately the tobacco statutes and the subsequent cases are more important as indications of early dissatisfaction with the Crown, the widespread publicity surrounding them surely made the Framers wary of indexing salaries by reference to some commodity.

also serves another, related purpose. As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice—more often than not more lucrative than the bench—the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice. *Evans* v. *Gore*, 253 U. S., at 253; 1 J. Kent, Commentaries on American Law 276 (1826).

IV

The four statutes now before us present an issue never before addressed by this Court: when, if ever, does the Compensation Clause prohibit the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted? We must decide when a salary increase authorized by Congress under such a formula "vests"—*i. e.*, becomes irreversible under the Compensation Clause. Is the protection of the Clause first invoked when the formula is *enacted* or when increases *take effect*?

A

Appellees argue that we need not reach this constitutional question. They contend that Congress intended these four statutes do no more than halt *funding* for the salary increases under the Adjustment Act. If, as appellees contend, the statutes are appropriations measures that do not alter substantive law, the increases in all four years nevertheless are now in effect and the Government is obliged to pay them; it has simply to authorize that payment. Accordingly, appellees submit, these congressional actions violate the Compensation Clause regardless of whether Congress could have rescinded increases previously passed.

As a general rule, "repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). See also *TVA* v. *Hill*, 437 U. S. 153, 189 (1978), and *Morton* v. *Mancari*, 417 U. S. 535, 549 (1974). This rule applies

with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill. *TVA* v. *Hill*, *supra*, at 190. Indeed, the rules of both Houses limit the ability to change substantive law through appropriations measures. See Senate Standing Rule XVI (4); House of Representatives Rule XXI (2). Nevertheless, when Congress desires to suspend or repeal a statute in force, "[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." *United States* v. *Dickerson*, 310 U. S. 554, 555 (1940). "The whole question depends on the intention of Congress as expressed in the statutes." *United States* v. *Mitchell*, 109 U. S. 146, 150 (1883). See also *Belknap* v. *United States*, 150 U. S. 588, 594 (1893).[23]

In the cases now before us, we conclude that in each of the four years in question Congress intended to repeal or postpone previously authorized increases. In the statute for Year 2, Congress expressly stated that the Adjustment Act increase due the following October "shall not take effect." Pub. L. 95–66, 91 Stat. 270. Thus, the plain words of the statute reveal an intention to repeal the Adjustment Act insofar as it would increase salaries in October 1977. This reading finds support in the House Report on the bill, which repeatedly uses language such as "eliminate the expected October 1977 comparability adjustment." See H. R. Rep. No. 95–458, pp. 1, 3 (1977). The floor remarks of Senators and Representatives confirm that this construction was generally understood.[24]

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[23] Indeed, in both *Mitchell* and *Belknap*, the Court held that provisions in appropriations statutes funding certain officials' salaries at amounts below those established under previous statutes operated to repeal the relevant provisions of those statutes and set new salary levels.

[24] See, *e. g.*, 123 Cong. Rec. 7095 (1977) (remarks of Sen. Byrd) ("salaries . . . shall not be increased . . . thus obviat[ing] the effect of the comparability pay provisions"); *ibid.* (remarks of Sen. Baker) ("forgo and rescind that adjustment"); *id.*, at 21121 (remarks of Rep. Solarz)

The statutes in Years 1, 3, and 4, although phrased in terms of limiting funds, see *supra*, at 205–206, 207, 208, nevertheless were intended by Congress to block the increases the Adjustment Act otherwise would generate. Representative Shipley introduced the rider in relation to Year 1 to "preven[t] the automatic cost-of-living pay increase . . . ." 122 Cong. Rec. 28872 (1976).[25] Floor remarks in both Houses reflected this view.[26] In Year 3, the House Report characterized the statute as a "change [in] the application of existing law," H. R. Rep. No. 95–1254, p. 31 (1978), and described its effect as creating a one-year "pay freeze," *id.*, at 35. The Senate Re-

("knock[s] out the comparability increase for this year"); *id.*, at 21125 (remarks of Rep. Ammerman) ("deny the October 1 cost-of-living pay increase").

[25] Representative Shipley's original amendment applied only to Members of the House of Representatives. The provision was expanded to cover all officials subject to the Salary Act. See 122 Cong. Rec. 28877 (1976). The Senate Committee studying the bill recommended the provision be deleted altogether, see S. Rep. No. 94–1201, p. 2 (1976), but the Senate ultimately passed a version applying the freeze to all Members of Congress, see 122 Cong. Rec. 29132–29133 (1976). The Conference Committee recommended that the freeze apply to all Salary Act positions, see H. R. Conf. Rep. No. 94–1559, p. 3 (1976). This recommendation prevailed.

[26] See, *e. g.*, 122 Cong. Rec. 28865 (1976) (remarks of Rep. Armstrong) (a "freeze of the salaries"); *ibid.* (remarks of Rep. Yates) ("freeze the salaries"); *ibid.* (remarks of Rep. McClory) ("effectively eliminate the . . . cost-of-living increases"); *id.*, at 28870 (remarks of Rep. Derwinski) ("freezing . . . pay at its current level"); *id.*, at 28871 (remarks of Rep. Miller) ("stopping the pay raise"); *id.*, at 28879 (remarks of Rep. Anderson) ("block a cost-of-living pay increase"); *id.*, at 29132 (remarks of Sen. Taft) ("effectively freeze those salaries—the employees would not be given a cost-of-living raise on October 1, or a salary increase"); *id.*, at 29164 (remarks of Sen. Allen) ("freezing the compensation"); *id.*, at 29172 (remarks of Sen. Allen) ("denied the upcoming increase"; "salaries frozen at the September 30, 1976, level"); *id.*, at 29372 (remarks of Sen. Bartlett) ("automatic pay raises . . . eliminated"); *id.*, at 31892 (remarks of Rep. Shipley) ("no October cost-of-living increases would be made"; bill "proscribe[s] . . . the October cost-of-living pay increase[s]"); *id.*, at 31896 (remarks of Rep. Riegle) ("elimination of the cost-of-living raise").

port stated that the statute would "continu[e] . . . the so called 'cap' " on salaries for the next fiscal year. S. Rep. No. 95–1024, p. 50 (1978). Floor debate once again expressed agreement with this construction.[27] The House Report on the statute for Year 4 characterized it as "reduc[ing] Federal executive pay increases from the mandatory entitlement of 12.9 per centum to 5.5 per centum." H. R. Rep. No. 96–500, p. 7 (1979). The Report referred to the bill as a change in existing law. See *id.*, at 3. Later the Conference Report stated that the statute "restricts Cost-of-Living increases to 5.5 percent" for the fiscal year just begun. H. R. Conf. Rep. No. 96–513, p. 3 (1979). The floor debates also confirm this understanding.[28]

These passages indicate clearly that Congress intended to rescind these raises entirely, not simply to consign them to the fiscal limbo of an account due but not payable. The clear intent of Congress in each year was to stop for that year the application of the Adjustment Act. The issue thus resolves itself into whether Congress could do so without violating the Compensation Clause.

B

Year 1

The statute applying to Year 1 was signed by the President during the business day of October 1, 1976. By that time, the 4.8% increase under the Adjustment Act already had

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[27] See, *e. g.*, 124 Cong. Rec. 17603 (1978) (remarks of Rep. Shipley) ("pay freeze"); *id.*, at 17604 (remarks of Rep. Armstrong) ("automatic cost-of-living increases will not be permitted"); *id.*, at 24375 (remarks of Sen. Sasser) ("freeze, during fiscal year 1979, the pay").

[28] See, *e. g.*, 125 Cong. Rec. 27532 (1979) (remarks of Rep. Whitten) ("sharply decreas[es] such automatic increases"); *id.*, at 27533 (remarks of Rep. Jacobs) ("rollback of the automatic 12.9-percent salary increase"); *id.*, at 28019 (remarks of Sen. Byrd) ("put a cap on that pay increase"); *id.*, at 28020 (remarks of Sen. Magnuson) ("this is in the nature of a cap, a limitation"); *id.*, at 28108 (remarks of Rep. Conte) ("reduces from 12.9 to 5.5 percent the increase in pay").

taken effect, since it was operative with the start of the month—and the new fiscal year—at the beginning of the day. The statute became law only upon the President's signing it on October 1; it therefore purported to repeal a salary increase already in force. Thus it "diminished" the compensation of federal judges.[29]

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[29] The Government asks us to invoke the rule that the law does not recognize fractions of a day, see, *e. g.*, *Lapeyre* v. *United States*, 17 Wall. 191 (1873); it is argued that we should treat the President's assent as having been given at the start of October 1, the same time the Year 1 increase was to take effect. It is correct that "the law generally reject[s] all fractions of a day, in order to avoid disputes." 2 W. Blackstone, Commentaries *141. Here, however, the Government acknowledges that the statute was signed by the President *after* the Year 1 increase had taken effect. This Court, almost a century ago, stated:

"'[W]henever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into the fractions of any other unit of time. The rule is purely one of convenience, which must give way whenever the rights of parties require it. . . . The law is not made of such unreasonable and arbitrary rules.'" *Louisville* v. *Savings Bank*, 104 U. S. 469, 474–475 (1881) (quoting *Grosvenor* v. *Magill*, 37 Ill. 239, 240–241 (1865); citations omitted).

Accord, *Combe* v. *Pitt*, 3 Burr. 1423, 97 Eng. Rep. 907 (K. B. 1763); 2 C. Sands, Sutherland on Statutory Construction § 33.10 (4th ed. 1973).

In *Burgess* v. *Salmon*, 97 U. S. 381 (1878), this Court was required to look to the time of day when a statute was enacted as compared to another and related event. This Court held that, notwithstanding the general rule, a person could not be subjected to a civil fine for violating a statute passed on the same day he engaged in the conduct but after that conduct had occurred. To impose a penalty on an act innocent when performed would render the statute an *ex post facto* law. *Id.*, at 384–385. Thus *Burgess* dealt not so much with benefits and penalties as it did with constitutional limitations on the legislative authority of Congress and the Executive. In the context of periodic increases, the Compensation Clause, like the *Ex Post Facto* Clause of Art. I, § 9, places limits on Congress and the President. Because of the constitutional implications, the logic of *Burgess* applies to the statute for Year 1 and requires us to look to the precise time the statute became law by the President's action.

The Government contends that Congress could reduce compensation as long as it did not "discriminate" against judges, as such, during the process. That the "freeze" applied to various officials in the Legislative and the Executive Branches, as well as judges, does not save the statute, however. This is quite different from the situation in *O'Malley* v. *Woodrough*, 307 U. S. 277 (1939). There the Court held that the Compensation Clause was not offended by an income tax levied on Article III judges as well as on all other taxpayers; there was no discrimination against the plaintiff judge. Federal judges, like all citizens, must share "the material burden of the government . . . ." *Id.*, at 282. The inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that Clause; the Constitution makes no exceptions for "nondiscriminatory" reductions.[30] Accordingly, we hold that the statute with respect to Year 1, as applied to compensation of members of the certified class, violates the Compensation Clause of Art. III.

Year 2

Unlike the statute for Year 1, the statute for Year 2 was signed by the President before October 1, when the 7.1% raise under the Comparability Act was due to take effect. Year 2 thus confronts us squarely with the question of whether Congress may, before the effective date of a salary increase, rescind such an increase scheduled to take effect at a later date. The District Court held that by including an annual cost-of-living adjustment in the statutory definitions of the salaries of Article III judges, see *supra*, at 204, and n. 2, Congress made the annual adjustment, from that moment on,

[30] We need not address the question of whether evidence of an intent to influence the Judiciary would invalidate a statute that on its face does not directly reduce judicial compensation. See *Evans* v. *Gore*, 253 U. S. 245, 252 (1920).

a part of judges' compensation for constitutional purposes. Subsequent action reducing those adjustments "diminishes" compensation within the meaning of the Compensation Clause. Relying on *Evans* v. *Gore*, 253 U. S., at 254, the District Court held that such action reduces the amount "a judge . . . has been promised," and all amounts thus promised fall within the protection of the Clause.

We are unable to agree with the District Court's analysis and result. Our discussion of the Framers' debates over the Compensation Clause, *supra*, at 219–220, led to a conclusion that the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges.[31] Rather, that provision embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence. The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.

Congress enacted the Adjustment Act based on this delegated power to fix and, periodically, increase judicial compensation. It did not thereby alter the *compensation* of judges; it modified only the *formula* for determining that compensation. Later, Congress decided to abandon the for-

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[31] In *O'Malley* v. *Woodrough*, 307 U. S. 277 (1939), this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles* v. *Graham*, 268 U. S. 501 (1925), was inconsistent, it "cannot survive." 307 U. S., at 282–283. Because *Miles* relied on *Evans* v. *Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*, on which the District Court relied in reaching its decision.

mula as to the particular years in question. For Year 2, as opposed to Year 1, the statute was passed before the Adjustment Act increases had taken effect—before they had become a part of the compensation due Article III judges. Thus, the departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula.[32]

A paramount—indeed, an indispensable—ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches. To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress.[33] We therefore conclude

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[32] *United States* v. *More* (CC DC 1803), writ of error dism'd for want of jurisdiction, 3 Cranch 159 (1805), is not to the contrary. Congress had enacted a system of fees for compensating justices of the peace in the District of Columbia but subsequently abolished the fees. The Government brought an indictment against a justice of the peace who had continued to charge the fees, and the defendant demurred. The Circuit Court for the District of Columbia held that the compensation of justices of the peace in the District of Columbia was subject to the Compensation Clause and that a statute diminishing (here, abolishing) the fees violated the Constitution. *Id.*, at 161, n. In *More*, the fee system was already in place as part of the justices' compensation when Congress repealed it. Here, by contrast, the increase in Year 2 had not yet become part of the compensation of Article III judges when the statute repealing it was passed and signed by the President.

[33] Indeed, it would be particularly ironic if we were to bind Congress to an indexing scheme for salaries when the Framers themselves rejected an indexing proposal. See *supra*, at 220. Of course, indexing techniques have improved since 1787. Nevertheless, Congress' repeated rejections of specific adjustments indicates some dissatisfaction with automatic adjustments according to a predetermined formula, even if not with the formula itself.

that a salary increase "vests" for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges. With regard to Year 2, we hold that the Compensation Clause did not prohibit Congress from repealing the planned but not yet effective cost-of-living adjustment of October 1, 1977, when it did so before October 1, the time it first was scheduled to become part of judges' compensation. The statute in Year 2 thus represents a constitutionally valid exercise of legislative authority.

Year 3

For our purposes, the legal issues presented by the statute in Year 3 are indistinguishable from those in Year 2. Each statute eliminated—before October 1—the Adjustment Act salary increases contemplated but not yet implemented. Each statute was passed and signed by the President *before* the Adjustment Act increases took effect, in the case of Year 3, on September 30. For the reasons set forth in our discussion of the issues for Year 2, we hold that the statute in Year 3 did not violate the Compensation Clause.

Year 4

Before reaching the constitutional issues implicated in Year 4, we must resolve a problem of statutory construction. On its face, the statute in Year 4 applies in terms to "executive employees, which includes Members of Congress." See *supra*, at 208. It does not expressly mention judges. Appellees contend that even if Congress constitutionally could freeze the salaries of Article III judges, it did not do so in this statute.

We are satisfied that Congress' use of the phrase "executive employees," in context, was intended to include Article III judges. The full title of the Adjustment Act is the *Executive* Salary Cost-of-Living Adjustment Act, but it is clear that it was intended to apply to officials in the Legislative and the

Judicial Branches as well.[34] The title does not control over the terms of the statute. The statutes in the three preceding years undeniably applied to judges, and we can discern no indication that the Congress chose to single them out for an exemption when it was including Executive and Legislative officials. Most important, both the Conference Report and the Chairman of the House Appropriations Committee, speaking on the floor, made explicit what already was implicit: the limiting statute would apply to judges as well. See H. R. Conf. Rep. No. 96–513, p. 3 (1979); 125 Cong. Rec. 27530, 27532 (1979) (remarks of Rep. Whitten).[35]

Having concluded that the statute in Year 4 was intended to apply to judges as well as other high-level federal officials, we are confronted with a situation similar to that in Year 1. Here again, the statute purported to revoke an increase in judges' compensation *after* those statutes had taken effect. For the reasons governing the statute as to Year 1, we hold that the statute revoking the increase for Year 4 violated the Compensation Clause insofar as it applied to members of the certified class.

V

The District Court has not yet calculated the precise dollar amounts involved in Years 1 and 4, the years in which we hold the statutes violated the Compensation Clause. Further proceedings are required to resolve these questions. Accordingly, the judgment of the District Court in No. 79–983

[34] Most positions covered, of course, are in the Executive Branch, which may explain the limited title.

[35] Several Members of Congress acknowledged the potential constitutional problem with rolling back the salary increase already in effect for judges. See 125 Cong. Rec. 27529–27530 (1979) (remarks of Rep. Latta); *id.*, at 27531–27533 (remarks of Rep. Whitten); *id.*, at 27533 (remarks of Rep. Jacobs); *id.*, at 28022 (remarks of Sen. Stevens). Representative Whitten, the Chairman of the House Appropriations Committee, stated that "the courts will have to make a final determination regarding this issue." *Id.*, at 27532.

is affirmed in part and reversed in part, the judgment in No. 79–1689 is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN took no part in the decision of these cases.

FEDERAL TRADE COMMISSION ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-900. Argued October 15, 1980—Decided December 15, 1980

The Federal Trade Commission (FTC) issued a complaint against respondent and several other major oil companies, alleging that the FTC had "reason to believe" that the companies were violating § 5 of the Federal Trade Commission Act (Act), which prohibits unfair methods of competition or unfair or deceptive acts or practices in commerce. While adjudication of the complaint before an Administrative Law Judge was still pending, respondent, having unsuccessfully sought to have the FTC withdraw the complaint, brought an action in Federal District Court, alleging that the FTC had issued its complaint without having "reason to believe" that respondent was violating the Act, and seeking an order declaring the complaint unlawful and requiring that it be withdrawn. The District Court dismissed the action. The Court of Appeals reversed, holding that the District Court could inquire whether the FTC *in fact* had made the determination that it had reason to believe that respondent was violating the Act, and that the issuance of the complaint was "final agency action" under § 10 (c) of the Administrative Procedure Act (APA).

Held: The FTC's issuance of its complaint was not "final agency action" under § 10 (c) of the APA and hence was not judicially reviewable before the conclusion of the administrative adjudication. Pp. 238-246.

(a) The issuance of the complaint was not a definitive ruling or regulation and had no legal force or practical effect upon respondent's daily business other than the disruptions that accompany any major litigation. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, distinguished. Immediate judicial review would serve neither efficiency nor enforcement of the Act. Pp. 239-243.

(b) Although respondent, by requesting the FTC to withdraw its complaint and awaiting the FTC's refusal to do so, may have exhausted its administrative remedy as to the averment of a "reason to believe," the FTC's refusal to withdraw the complaint does not render the complaint a "definitive" action. Such refusal does not augment the complaint's legal force or practical effect on respondent, nor does it diminish the concern for efficiency and enforcement of the Act. P. 243.

(c) The expense and disruption in defending itself, even if substantial, does not constitute irreparable injury to respondent. P. 244.

(d) Respondent's challenge to the FTC's complaint will not become "insulated" from judicial review if it is not reviewed before the FTC's adjudication concludes, since under the APA a court of appeals reviewing a cease-and-desist order has the power to review alleged unlawfulness in the issuance of an agency complaint, assuming that the issuance of the complaint is not "committed to agency discretion by law." Pp. 244–245.

(e) Since issuance of the complaint averring "reason to believe" is a step toward, and will merge in, the FTC's decision on the merits, the claim of illegality in issuance of the complaint is not subject to judicial review as a "collateral" order. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, distinguished. P. 246.

596 F. 2d 1381, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 247. STEWART, J., took no part in the consideration or decision of the case.

Solicitor General McCree argued the cause for petitioners. With him on the briefs were *Deputy Solicitor General Wallace, Elliot Schulder, Michael N. Sohn, Howard E. Shapiro, Joanne L. Levine,* and *Mark W. Haase.*

George A. Sears argued the cause for respondent. With him on the brief were *Richard W. Odgers* and *C. Douglas Floyd.**

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the issuance of a complaint by the Federal Trade Commission is "final agency action" subject to judicial review before administrative adjudication concludes.

**Daniel J. Popeo* and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation as *amicus curiae* urging affirmance.

I

On July 18, 1973, the Federal Trade Commission issued and served upon eight major oil companies, including Standard Oil Company of California (Socal),[1] a complaint averring that the Commission had "reason to believe" that the companies were violating § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45,[2] and stating the Commission's charges in that respect.[3] The Commission issued the complaint under authority of § 5 (b) of the Act, 15 U. S. C. § 45 (b), which provides:

> "Whenever the Commission shall have reason to believe that any . . . person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing . . . ."

An adjudication of the complaint's charges began soon there-

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[1] The other seven respondents to the complaint were Exxon Corp., Texaco, Inc., Gulf Oil Corp., Mobil Oil Corp., Standard Oil Co. (Indiana), Shell Oil Corp., and Atlantic Richfield Co. *In re Exxon Corporation, et al.*, Docket No. 8934.

[2] Section 5 of the Act, as set forth in 15 U. S. C. § 45, provides in pertinent part:

"(a) . . . (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

[3] The Commission charged that the eight companies had "maintained and reinforced a noncompetitive market structure in the refining of crude oil into petroleum products," had "exercised monopoly power in the refining of petroleum products," and had followed "common courses of action in accommodating the needs and goals of each other throughout the petroleum industry."

after before an Administrative Law Judge, and is still pending.

On May 1, 1975, Socal filed a complaint against the Commission in the District Court for the Northern District of California, alleging that the Commission had issued its complaint without having "reason to believe" that Socal was violating the Act.[4] Socal sought an order declaring that the issuance of the complaint was unlawful and requiring that the complaint be withdrawn. Socal had sought this relief from the Commission and been denied.[5] In support of its allegation and request, Socal recited a series of events that preceded the issuance of the complaint and several events that followed. In Socal's estimation, the only inference to be drawn from these events was that the Commission lacked sufficient evidence when it issued the complaint to warrant a belief that Socal was violating the Act.

The gist of Socal's recitation of events preceding the issuance of the complaint is that political pressure for a public explanation of the gasoline shortages of 1973 forced the Commission to issue a complaint against the major oil companies despite insufficient investigation. The series of events began on May 31, 1973. As of that day, the Commission had not

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[4] Socal invoked federal-court jurisdiction under 5 U. S. C. § 704 and 28 U. S. C. §§ 1331, 1337, 1346, 1361, and 2201.

[5] The Commission had denied Socal's motion to dismiss the complaint on February 12, 1974. The Commission also had denied Socal's motion for reconsideration, stating:

"[I]t has long been settled that the adequacy of the Commission's 'reason to believe' a violation of law has occurred and its belief that a proceeding to stop it would be in the 'public interest' are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred. That is the posture of the instant matter." *In re Exxon Corp.*, 83 F. T. C. 1759, 1760 (1974).

examined any employees, documents, or books of Socal's, although the Commission had announced in December 1971, that it intended to investigate possible violations of the Federal Trade Commission Act in the petroleum industry.

On May 31, Senator Henry M. Jackson, then Chairman of the Senate Interior and Insular Affairs Committee and of the Permanent Investigation Subcommittee of the Senate Committee of Government Operations, requested the Commission "to prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products." Immediately the Commission subpoenaed three Socal officers to testify before it, and they did so in late June. This examination was the Commission's only inquiry as to Socal's books and records, and the only interview of a Socal officer, prior to the issuance of the complaint.[6] On July 6, the Commission sent to Senator Jackson a "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry," requesting that the report not be made public because it had not yet "been evaluated or approved by the Commission." On July 9, Senator Jackson informed the Commission by letter that he intended to publish the report as a congressional committee reprint unless the Commission explained by July 13 why public release of the report would be improper. The Commission responded on July 11 that public release of the report, which the Commission characterized as "an internal staff memorandum," would be "inconsistent with [the Commission's] duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation." On July 13, Senator Jackson released the report for publica-

[6] On July 6, 1973, the Commission subpoenaed certain of Socal's books and records, but the complaint was issued before those records were produced. The subpoena was quashed on July 27, 1973, by the commencement of adjudication.

tion by the Senate Committee on Interior and Insular Affairs. On July 18, the Commission issued its complaint.

The subsequent events recited by Socal in its complaint were intended to confirm that the Commission lacked sufficient evidence before issuing its complaint to determine that it had reason to believe that Socal was violating the Act. One subsequent event was the issuance on August 27 of a report by the Office of Energy Advisor of the Department of the Treasury, concluding that the Commission's staff report was wrong in implying that the major oil companies had contrived the gasoline shortages. The report recommended that the complaint be withdrawn. A second event was Senator Jackson's statement in January 1974, at the conclusion of congressional hearings about the shortages, that he had found no "hard evidence" that the oil companies had created shortages. In addition to these expressions of doubt about the allegations of the Commission's complaint, Socal recounted the several failures of the Commission's complaint counsel in the adjudication to comply with orders of the Administrative Law Judge to identify the witnesses and documents on which the Commission intended to rely. The complaint counsel admitted that most of the evidence and witnesses the Commission hoped to introduce were yet to be secured through discovery, and he moved to relax the Commission's procedural rules for adjudication in order to allow such extensive discovery. In certifying this motion to the Commission, the Administrative Law Judge recommended "withdrawal of this case from adjudication—that is, dismissal without prejudice—so that it may be more fully investigated." The Commission denied the complaint counsel's motion and declined to follow the Administrative Law Judge's recommendations.

The District Court dismissed Socal's complaint on the ground that "a review of preliminary decisions made by administrative agencies, except under most unusual circumstances, would be productive of nothing more than chaos." The Court of Appeals for the Ninth Circuit reversed. 596

F. 2d 1381 (1979). It held the Commission's determination whether evidence before it provided the requisite reason to believe is "committed to agency discretion" and therefore is unreviewable according to § 10 of the Administrative Procedure Act (APA), 5 U. S. C. § 701 (a)(2). The Court of Appeals held, however, that the District Court could inquire whether the Commission *in fact* had made the determination that it had reason to believe that Socal was violating the Act. If the District Court were to find upon remand that the Commission had issued the complaint "solely because of outside pressure or with complete absence of a 'reason to believe' determination," 596 F. 2d, at 1386, then it was to order the Commission to dismiss the complaint. The Court of Appeals further held that the issuance of the complaint was "final agency action" under § 10 (c) of the APA, 5 U. S. C. § 704.

We granted the Commission's petition for a writ of certiorari because of the importance of the questions raised by Socal's request for judicial review of the complaint before the conclusion of the adjudication. 445 U. S. 903 (1980). We now reverse.

II

The Commission averred in its complaint that it had reason to believe that Socal was violating the Act. That averment is subject to judicial review before the conclusion of administrative adjudication only if the issuance of the complaint was "final agency action" or otherwise was "directly reviewable" under § 10 (c) of the APA, 5 U. S. C. § 704. We conclude that the issuance of the complaint was neither.[7]

[7] In addition to contending that the issuance of the complaint is not "final" agency action, the Commission argues that the issuance is not "agency action" under § 2 (g) of the APA, 5 U. S. C. § 551 (13), and that, if agency action, it is "committed to agency discretion by law" under § 10. 5 U. S. C. § 701 (a)(2).

We agree with Socal and with the Court of Appeals that the issuance of the complaint is "agency action." The language of the APA and its legis-

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The Commission's issuance of its complaint was not "final agency action." The Court observed in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967), that "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." In *Abbott Laboratories*, for example, the publication of certain regulations by the Commissioner of Food and Drugs was held to be final agency action subject to judicial review in an action for declaratory judgment brought prior to any Government action for enforcement. The regulations required manufacturers of prescription drugs to print certain information on drug labels and advertisements. The regulations were "definitive" statements of the Commission's position, *id.*, at 151, and had a "direct and immediate . . . effect on the day-to-day business" of the complaining parties. *Id.*, at 152. They had "the status of law" and "immediate compliance with their terms

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lative history support this conclusion. According to § 10 of the APA, 5 U. S. C. § 701 (b)(2), "agency action" has the meaning given to it by § 2, 5 U. S. C. § 551. That section provides that "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U. S. C. § 551 (13), and also that "'order' means the whole or a part of a final disposition . . . of an agency in a matter other than rule making . . . ." 5 U. S. C. § 551 (6). According to the legislative history of the APA:

"The term 'agency action' brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction." S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946).

We conclude that the issuance of the complaint by the Commission is "a part of a final disposition" and therefore is "agency action."

In view of our conclusion that the issuance of the complaint was not "*final* agency action," we do not address the question whether the issuance of a complaint is "committed to agency discretion by law." 5 U. S. C. § 701 (a)(2).

was expected." *Ibid.* In addition, the question presented by the challenge to the regulations was a "legal issue . . . fit for judicial resolution." *Id.*, at 153. Finally, because the parties seeking the declaratory judgment represented almost all the parties affected by the regulations, "a pre-enforcement challenge . . . [was] calculated to speed enforcement" of the relevant Act. *Id.*, at 154. Taking "a similarly flexible view of finality," *id.*, at 150, and in view of similar pragmatic considerations, the Court had held the issuance of administrative regulations to be "final agency action" in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407 (1942), *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956), and *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956).[8] The issuance of the complaint in this case, however, is materially different.

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[8] In *Columbia Broadcasting System, Inc.* v. *United States*, the Court held reviewable a regulation of the Federal Communications Commission proscribing certain contractual arrangements between chain broadcasters and local stations. The Commission did not have authority to regulate such contracts; its regulation asserted only that the Commission would not license stations which maintained such contracts. In a challenge to the regulation before any enforcement action had been brought, the Court noted that the regulations had "the force of law before their sanctions are invoked as well as after," that they were "promulgated by order of the Commission," and that "the expected conformity to them causes injury cognizable by a court of equity." 316 U. S., at 418–419.

In *Frozen Food Express* v. *United States*, the Court held reviewable an order of the Interstate Commerce Commission specifying commodities that were deemed not to be "agricultural . . . commodities." The carriage of such commodities exempted vehicles from ICC supervision. The order was held to be "final agency action" in a challenge brought by a carrier transporting commodities that the ICC's order had not included in its terms.

In *United States* v. *Storer Broadcasting Co.*, the Court also held reviewable as "final agency action" a Federal Communications Commission regulation announcing a policy not to issue television licenses to applicants already owning five such licenses. The rulemaking was complete and "operate[d] to control the business affairs of Storer." 351 U. S., at 199.

By its terms, the Commission's averment of "reason to believe" that Socal was violating the Act is not a definitive statement of position. It represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings. To be sure, the issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the Act.[9] But the extent to which the respondent may challenge the complaint and its charges proves that the averment of reason to believe is not "definitive" in a comparable manner to the regulations in *Abbott Laboratories* and the cases it discussed.

Section 5 of the Act, 15 U. S. C. § 45 (b), in conjunction with Commission regulations, 16 CFR §§ 3.41–3.46 (1980), and § 5 of the APA, 5 U. S. C. § 554 (1976 ed. and Supp. III), requires that the complaint contain a notice of hearing at which the respondent may present evidence and testimony before an administrative law judge to refute the Commission's charges. Either party to the adjudication may appeal an adverse decision of the administrative law judge to the full Commission, 5 U. S. C. § 577; 16 CFR § 3.52 (1980); see 15 U. S. C. § 45 (c), which then may dismiss the complaint. See 15 U. S. C. § 45 (c). If instead the Commission enters an order requiring the respondent to cease and desist from engaging in the challenged practice, the respondent still is not bound by the Commission's decision until judicial review is complete or the opportunity to seek review has lapsed. 15 U. S. C. § 45 (g).[10] Thus, the averment of reason to believe is a prerequisite to a definitive agency position on the question whether Socal violated the Act, but itself is a determination only that adjudicatory proceedings will com-

[9] The Commission held as much in its order denying Socal's motion for reconsideration of the motion to dismiss. See n. 5, *supra*.

[10] Possible judicial review also includes review in this Court upon a writ of certiorari. 15 U. S. C. § 45 (g).

mence. Cf. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U. S. 103 (1948).

Serving only to initiate the proceedings, the issuance of the complaint averring reason to believe has no legal force comparable to that of the regulation at issue in *Abbott Laboratories*, nor any comparable effect upon Socal's daily business. The regulations in *Abbott Laboratories* forced manufacturers to "risk serious criminal and civil penalties" for noncompliance, 387 U. S., at 153, or "change all their labels, advertisements, and promotional materials; . . . destroy stocks of printed matter; and . . . invest heavily in new printing type and new supplies." *Id.*, at 152. Socal does not contend that the issuance of the complaint had any such legal or practical effect, except to impose upon Socal the burden of responding to the charges made against it. Although this burden certainly is substantial, it is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action.

In contrast to the complaint's lack of legal or practical effect upon Socal, the effect of the judicial review sought by Socal is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. *Weinberger* v. *Salfi*, 422 U. S. 749, 765 (1975). Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. *McGee* v. *United States*, 402 U. S. 479, 484 (1971); *McKart* v. *United States*, 395 U. S. 185, 195 (1969). Furthermore, unlike the review in *Abbott Laboratories*, judicial review to determine whether the Commission decided that it had the requisite reason to believe would delay resolution of the ultimate question whether the Act was violated. Finally, every respondent to a Commission com-

plaint could make the claim that Socal had made. Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes.

In sum, the Commission's issuance of a complaint averring reason to believe that Socal was violating the Act is not a definitive ruling or regulation. It had no legal force or practical effect upon Socal's daily business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations counsel against the conclusion that the issuance of the complaint was "final agency action."

B

Socal relies, however, upon different considerations than these in contending that the issuance of the complaint is "final agency action."

Socal first contends that it exhausted its administrative remedies by moving in the adjudicatory proceedings for dismissal of the complaint. By thus affording the Commission an opportunity to decide upon the matter, Socal contends that it has satisfied the interests underlying the doctrine of administrative exhaustion. *Weinberger* v. *Salfi, supra,* at 765. The Court of Appeals agreed. 596 F. 2d, at 1387. We think, however, that Socal and the Court of Appeals have mistaken exhaustion for finality. By requesting the Commission to withdraw its complaint and by awaiting the Commission's refusal to do so, Socal may well have exhausted its administrative remedy as to the averment of reason to believe. But the Commission's refusal to reconsider its issuance of the complaint does not render the complaint a "definitive" action. The Commission's refusal does not augment the complaint's legal force or practical effect upon Socal. Nor does the refusal diminish the concerns for efficiency and enforcement of the Act.

Socal also contends that it will be irreparably harmed unless the issuance of the complaint is judicially reviewed immediately. Socal argues that the expense and disruption of defending itself in protracted adjudicatory proceedings constitutes irreparable harm. As indicated above, we do not doubt that the burden of defending this proceeding will be substantial. But "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U. S. 209, 222 (1938). As we recently reiterated: "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 24 (1974).

Socal further contends that its challenge to the Commission's averment of reason to believe can never be reviewed unless it is reviewed before the Commission's adjudication concludes. As stated by the Court of Appeals, the alleged unlawfulness in the issuance of the complaint "is likely to become insulated from any review" if deferred until appellate review of a cease-and-desist order. 596 F. 2d, at 1387. Socal also suggests that the unlawfulness will be "insulated" because the reviewing court will lack an adequate record and it will address only the question whether substantial evidence supported the cease-and-desist order.[11]

We are not persuaded by this speculation. The Act ex-

[11] The Court of Appeals additionally suggested that the complaint would be "insulated" from review because the alleged unlawfulness would be moot if Socal prevailed in the adjudication. These concerns do not support a conclusion that the issuance of a complaint averring reason to believe is "final agency action." To the contrary, one of the principal reasons to await the termination of agency proceedings is "to obviate all occasion for judicial review." *Supra*, at 242; *McGee* v. *United States*, 402 U. S. 479, 484 (1971); *McKart* v. *United States*, 395 U. S. 185, 195 (1969). Thus, the possibility that Socal's challenge may be mooted in adjudication warrants the requirement that Socal pursue adjudication, not shortcut it.

pressly authorizes a court of appeals to order that the Commission take additional evidence.[12] 15 U. S. C. § 45 (c). Thus, a record which would be inadequate for review of alleged unlawfulness in the issuance of a complaint can be made adequate. We also note that the APA specifically provides that a "preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action," 5 U. S. C. § 704, and that the APA also empowers a court of appeals to "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law." 5 U. S. C. § 706. Thus, assuming that the issuance of the complaint is not "committed to agency discretion by law," [13] a court of appeals reviewing a cease-and-desist order has the power to review alleged unlawfulness in the issuance of a complaint. We need not decide what action a court of appeals should take if it finds a cease-and-desist order to be supported by substantial evidence but the complaint to have been issued without the requisite reason to believe. It suffices to hold that the possibility does not affect the application of the finality rule. Cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U. S. 540, 545 (1946).

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[12] Section 5 (c), as set forth in 15 U. S. C. § 45 (c), provides in pertinent part:

"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may see proper."

[13] Contrary to the suggestion of JUSTICE STEVENS in his concurring opinion, we do not hold that the issuance of the complaint is *reviewable* agency action. We leave open the question whether the issuance of the complaint is unreviewable because it is "committed to agency discretion by law." *See* n. 7, *supra*.

C

There remains only Socal's contention that the claim of illegality in the issuance of the complaint is a "collateral" order subject to review under the doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949). It argues that the Commission's issuance of the complaint averring reason to believe "fall[s] in that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546. In that diversity case, a District Court refused to apply a state statute requiring shareholders bringing a derivative suit to post a security bond for the defendant's litigation expenses. This Court held that the District Court's order was subject to immediate appellate review under 28 U. S. C. § 1291. Giving that section a "practical rather than a technical construction," the Court concluded that this order "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment." 337 U. S., at 546.

Cohen does not avail Socal. What we have said above makes clear that the issuance of the complaint averring reason to believe is a step toward, and will merge in, the Commission's decision on the merits. Therefore, review of this preliminary step should abide review of the final order.

III

Because the Commission's issuance of a complaint averring reason to believe that Socal has violated the Act is not "final agency action" under § 10 (c) of the APA, it is not judicially reviewable before administrative adjudication concludes.[14]

[14] By this holding, we do not encourage the issuance of complaints by the Commission without a conscientious compliance with the "reason to believe" obligation in 15 U. S. C. § 45 (b). The adjudicatory proceedings

We therefore reverse the Court of Appeals and remand for the dismissal of the complaint.

It is so ordered.

JUSTICE STEWART took no part in the consideration or decision of this case.

JUSTICE STEVENS, concurring in the judgment.

"Agency action" is a statutory term that identifies the conduct of executive and administrative agencies that Congress intended to be reviewable in federal court.[1] In general, the term encompasses formal orders, rules, and interpretive decisions that crystallize or modify private legal rights.[2] Agency action that is merely "preliminary, procedural, or intermediate" is subject to judicial review at the termination of the proceeding in which the interlocutory ruling is made.[3] Today

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which follow the issuance of a complaint may last for months or years. They result in substantial expense to the respondent and may divert management personnel from their administrative and productive duties to the corporation. Without a well-grounded reason to believe that unlawful conduct has occurred, the Commission does not serve the public interest by subjecting business enterprises to these burdens.

[1] Title 5 U. S. C. § 702 provides in part:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[2] Section 701 (b)(2) provides:

"For the purposes of this chapter—

. . . . . .

"(2) 'person', 'rule', 'order', 'license', 'sanction', 'relief', and 'agency action' have the meanings given them by section 551 of this title."

Section 551 (13) provides:

" 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

[3] Section 704 provides in part:

"A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

the Court holds that an agency decision to initiate administrative proceedings is in the interlocutory category. In a footnote, *ante*, at 238–239, n. 7, the Court determines *whether* the decision is ever reviewable and in the body of the opinion the Court determines *when* it is reviewable.

In my opinion, Congress did not intend to authorize any judicial review of decisions to initiate administrative proceedings. The definition of "agency action" found in 5 U. S. C. § 551 (13) plainly contemplates action that affects legal rights in some way. As the Court points out, *ante*, at 242, the mere issuance of a complaint has no legal effect on the respondent's rights. Although an agency's decision to file a complaint may have a serious impact on private parties who must respond to such complaints, that impact is comparable to that caused by a private litigant's decision to file a lawsuit or a prosecutor's decision to present evidence to a grand jury. A decision to initiate proceedings does not have the same kind of effect on legal rights as "an agency rule, order, license [or other sanction]."[4] I am aware of nothing in the Administrative Procedure Act, or its history, that indicates that Congress intended to authorize judicial review of this type of decision.

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[4] See n. 2, *supra*. The Court's partial quotation of the definition of the term "order" in 5 U. S. C. § 551 (6), see *ante*, at 239, n. 7, implies that the Court regards the initial step in a proceeding as a "part" of the final order terminating the proceeding. In my opinion that is a rather plain misreading of the definition. An ordinary reader would interpret "part" of an order to refer to one of several paragraphs or sections in that document, not to actions that preceded the entry of the order. Under a contrary reading, presumably the Commission's action in filing a brief directed to some preliminary issue in the proceeding would be considered "part" of the agency action terminating the proceedings and therefore subject to judicial review. Section 551 (6) reads, in full, as follows:

"'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."

The practical consequences of the Court's contrary holding—that the Commission's prelitigation decision, although not reviewable now, will be reviewable later [5]—confirms my opinion that the Court's decision does not reflect the intent of Congress. If the Commission ultimately prevails on the merits of its complaint, Socal surely will not be granted immunity because the Commission did not uncover the evidence of illegality until after the complaint was filed. On the other hand, if Socal prevails, there will be no occasion to review the contention that it now advances, because the only relief it seeks is a dismissal of the Commission's complaint. Socal is surely correct when it argues that unless review is available now, meaningful review can never be had.

The Court's casual reading of the Administrative Procedure Act is unfortunate for another reason. The disposition of a novel and important question of federal jurisdiction in a footnote will lend support to the notion that federal courts have a "carte blanche" authorizing judicial supervision of almost everything that the Executive Branch of Government may do. Because that notion has an inevitable impact on the quantity and quality of judicial service, federal judges should be especially careful to construe their own authority strictly. I therefore respectfully disagree with the Court's perfunctory analysis of the "agency action" issue. I do, however, concur in its judgment because I am persuaded that the Commission's decision to initiate a complaint is not "agency action" within the meaning of § 10 (b) of the Administrative Procedure Act, 5 U. S. C. § 702.

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[5] Because judicial review of the Commission's decision is not specifically proscribed by statute, the decision to file a complaint will be reviewable later unless the Commission, by a showing of "clear and convincing" evidence, can overcome the strong presumption against a determination that its action was "committed to agency discretion" under 5 U. S. C. § 701 (a)(2). See *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975).

DELAWARE STATE COLLEGE ET AL. *v.* RICKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-939. Argued October 7, 1980—Decided December 15, 1980

The Board of Trustees of petitioner Delaware State College formally voted to deny tenure to respondent professor on the basis of recommendations of the College's tenure committee and Faculty Senate. During the pendency of respondent's grievance before the Board's grievance committee, the Trustees on June 26, 1974, told him that pursuant to College policy he would be offered a 1-year "terminal" contract that would expire June 30, 1975. Respondent signed the contract, and on September 12, 1974, the Board notified him that it had denied his grievance. After the appropriate Delaware agency had waived its primary jurisdiction over respondent's employment discrimination charge under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC), on April 28, 1975, accepted his complaint for filing. More than two years later, the EEOC issued a "right to sue" letter, and respondent filed this action in the District Court on September 9, 1977. The complaint alleged, *inter alia*, that the College had discriminated against him on the basis of his national origin in violation of both Title VII and 42 U. S. C. § 1981. Title VII requires that a complaint be filed with the EEOC within 180 days (300 days under certain circumstances) "after the alleged unlawful employment practice occurred," 42 U. S. C. § 2000e-5 (e). Under the applicable Delaware statute of limitations, cases under 42 U. S. C. § 1981 must be filed within three years of the unfavorable employment decision. The District Court dismissed both of respondent's claims as untimely. It held that the only unlawful employment practice alleged was the College's decision to deny respondent tenure, and that the limitations periods for both claims had commenced to run by June 26, 1974, when the Board officially notified him that he would be offered a 1-year "terminal" contract. The Court of Appeals reversed, holding that the limitations period for both claims did not commence to run until the "terminal" contract expired on June 30, 1975.

Held: Respondent's Title VII and § 1981 claims were untimely. Pp. 256-262.

(a) The allegations of the complaint do not support respondent's "continuing violation" argument that discrimination motivated the College not only in denying him tenure but also in terminating his employ-

ment on June 30, 1975. The only discrimination alleged occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to respondent. This is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later. Pp. 256–258.

(b) Nor can the final date of employment be adopted, for policy reasons and simplicity, as the date when the limitations periods commenced. Where, as here, the only challenged practice occurs before the date of termination of employment, the limitations periods necessarily commenced to run before that date. Pp. 259–260.

(c) The date when respondent was notified that his grievance had been denied, September 12, 1974, cannot be considered to be the date of the unfavorable tenure decision. The Board had made clear well before then that it had formally rejected respondent's tenure bid, and entertaining a grievance complaining of the tenure decision does not suggest that the prior decision was in any respect tentative. Nor does the pendency of a grievance, or some other method of collateral review of an employment decision, toll the running of the limitations periods, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229. Pp. 260–261.

(d) The District Court's conclusion that the limitations periods had commenced to run by June 26, 1974, when the Board notified respondent that he would be offered a "terminal" contract, was not erroneous. In light of the earlier recommendations of the tenure committee and the Faculty Senate that respondent not receive tenure and the Board's formal vote to deny tenure, the conclusion that the College had established its official position—and made that position apparent to respondent—no later than June 26, 1974, was justified. Pp. 261–262.

605 F. 2d 710, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 262. STEVENS, J., filed a dissenting opinion, *post*, p. 265.

Nicholas H. Rodriguez argued the cause for petitioners. With him on the briefs were *Harold Schmittinger* and *William D. Fletcher, Jr.*

Judith E. Harris argued the cause and filed briefs for respondent.*

**Robert E. Williams, Douglas S. McDowell,* and *Daniel R. Levinson*

JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether respondent, a college professor, timely complained under the civil rights laws that he had been denied academic tenure because of his national origin.

I

Columbus Ricks is a black Liberian. In 1970, Ricks joined the faculty at Delaware State College, a state institution attended predominantly by blacks. In February 1973, the Faculty Committee on Promotions and Tenure (the tenure committee) recommended that Ricks not receive a tenured position in the education department. The tenure committee, however, agreed to reconsider its decision the following year. Upon reconsideration, in February 1974, the committee adhered to its earlier recommendation. The following month, the Faculty Senate voted to support the tenure committee's negative recommendation. On March 13, 1974, the College Board of Trustees formally voted to deny tenure to Ricks.

Dissatisfied with the decision, Ricks immediately filed a grievance with the Board's Educational Policy Committee (the grievance committee), which in May 1974 held a hearing and took the matter under submission.[1] During the pendency of the grievance, the College administration continued to plan for Ricks' eventual termination. Like many colleges

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filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Deputy Solicitor General Wallace, Edwin S. Kneedler, Leroy D. Clark, Joseph T. Eddins,* and *Lutz Alexander Prager* for the United States et al.; and by *David M. Rabban* and *Victor J. Stone* for the American Association of University Professors.

[1] According to the Court of Appeals, the grievance committee almost immediately recommended to the Board that Ricks' grievance be denied. 605 F. 2d 710, 711 (CA3 1979). Nothing in the record, however, reveals the date on which the grievance committee rendered its decision.

and universities, Delaware State has a policy of not discharging immediately a junior faculty member who does not receive tenure. Rather, such a person is offered a "terminal" contract to teach one additional year. When that contract expires, the employment relationship ends. Adhering to this policy, the Trustees on June 26, 1974, told Ricks that he would be offered a 1-year "terminal" contract that would expire June 30, 1975.[2] Ricks signed the contract without ob-

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[2] The June 26 letter stated:

June 26, 1974

Dr. Columbus Ricks
Delaware State College
Dover, Delaware

Dear Dr. Ricks:

On March 13, 1974, the Board of Trustees of Delaware State College officially endorsed the recommendations of the Faculty Senate at its March 11, 1974 meeting, at which time the Faculty Senate recommended that the Board not grant you tenure.

As we are both aware, the Educational Policy Committee of the Board of Trustees has heard your grievance and it is now in the process of coming to a decision. The Chairman of the Educational Policy Committee has indicated to me that a decision may not be forthcoming until sometime in July. In order to comply with the 1971 Trustee Policy Manual and AAUP requirements with regard to the amount of time needed in proper notification of non-reappointment for non-tenured faculty members, the Board has no choice but to follow actions according to its official position prior to the grievance process, and thus, notify you of its intent not to renew your contract at the end of the 1974–75 school year.

Please understand that we have no way of knowing what the outcome of the grievance process may be, and that this action is being taken at this time in order to be consistent with the present formal position of the Board and AAUP time requirements in matters of this kind. Should the Educational Policy Committee decide to recommend that you be granted tenure, and should the Board of Trustees concur with their recommendation, then of course, it will supersede any previous action taken by the Board.

Sincerely yours,

/s/ Walton H. Simpson, President
Board of Trustees of Delaware State College

jection or reservation on September 4, 1974. Shortly thereafter, on September 12, 1974, the Board of Trustees notified Ricks that it had denied his grievance.

Ricks attempted to file an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) on April 4, 1975. Under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, however, state fair employment practices agencies have primary jurisdiction over employment discrimination complaints. See 42 U. S. C. § 2000e–5 (c). The EEOC therefore referred Ricks' charge to the appropriate Delaware agency. On April 28, 1975, the state agency waived its jurisdiction, and the EEOC accepted Ricks' complaint for filing. More than two years later, the EEOC issued a "right to sue" letter.

Ricks filed this lawsuit in the District Court on September 9, 1977.[3] The complaint alleged, *inter alia*, that the College had discriminated against him on the basis of his national origin in violation of Title VII and 42 U. S. C. § 1981.[4] The District Court sustained the College's motion to dismiss both claims as untimely. It concluded that the only unlawful em-

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[3] In addition to the College itself, other defendants (petitioners in this Court) are Trustees Walton H. Simpson, William H. Davis, William G. Dix, Edward W. Hagemeyer, James C. Hardcastle, Delma Lafferty, James H. Williams, William S. Young, Burt C. Pratt, Luna I. Mishoe, and Pierre S. duPont IV (ex officio); the academic dean, M. Milford Caldwell (now deceased); the education department chairman, George W. McLaughlin; and tenure committee members Romeo C. Henderson, Harriet R. Williams, Arthur E. Bragg, Ora Bunch, Ehsan Helmy, Vera Powell, John R. Price, Herbert Thompson, W. Richard Wynder, Ulysses Washington, and Jane Laskaris.

[4] Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

ployment practice alleged was the College's decision to deny Ricks tenure, and that the limitations periods for both claims had commenced to run by June 26, 1974, when the President of the Board of Trustees officially notified Ricks that he would be offered a 1-year "terminal" contract. See n. 2, *supra*. The Title VII claim was not timely because Ricks had not filed his charge with the EEOC within 180 days after that date. Similarly, the § 1981 claim was not timely because the lawsuit had not been filed in the District Court within the applicable 3-year statute of limitations.[5]

The Court of Appeals for the Third Circuit reversed. 605 F. 2d 710 (1979). It agreed with the District Court that Ricks' essential allegation was that he had been denied tenure illegally. *Id.*, at 711. According to the Court of Appeals, however, the Title VII filing requirement, and the statute of limitations for the § 1981 claim, did not commence to run until Ricks' "terminal" contract expired on June 30, 1975. The court reasoned:

> "'[A] terminated employee who is still working should not be required to consult a lawyer or file charges of discrimination against his employer as long as he is still working, even though he has been told of the employer's present intention to terminate him in the future.'" *Id.*, at 712, quoting *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 192 (CA3 1977), cert. denied, 439 U. S. 821 (1978).

See *Egelston* v. *State University College at Geneseo*, 535 F. 2d 752 (CA2 1976); cf. *Noble* v. *University of Rochester*, 535 F. 2d 756 (CA2 1976).

The Court of Appeals believed that the initial decision to terminate an employee sometimes might be reversed. The

[5] The statute of limitations in § 1981 cases is that applicable to similar claims under state law. *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975). The parties in this case agree that the applicable limitations period under Delaware law is three years.

aggrieved employee therefore should not be expected to resort to litigation until termination actually has occurred. Prior resort to judicial or administrative remedies would be "likely to have the negative side effect of reducing that employee's effectiveness during the balance of his or her term. Working relationships will be injured, if not sundered, and the litigation process will divert attention from the proper fulfillment of job responsibilities." 605 F. 2d, at 712. Finally, the Court of Appeals thought that a rule focusing on the last day of employment would provide a "bright line guide both for the courts and for the victims of discrimination." *Id.*, at 712–713. It therefore reversed and remanded the case to the District Court for trial on the merits of Ricks' discrimination claims. We granted certiorari. 444 U. S. 1070 (1980).

For the reasons that follow, we think that the Court of Appeals erred in holding that the filing limitations periods did not commence to run until June 30, 1975. We agree instead with the District Court that both the Title VII and § 1981 claims were untimely.[6] Accordingly, we reverse.

II

Title VII requires aggrieved persons to file a complaint with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U. S. C. § 2000e–5 (e).[7] Similarly, § 1981 plaintiffs in Delaware must file suit within three years of the unfavorable employment decision. See n. 5, *supra*. The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment

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[6] Because the claims were not timely filed, we do not decide whether a claim of national origin discrimination is cognizable under § 1981.

[7] Under certain circumstances, the filing period is extended to 300 days. 42 U. S. C. § 2000e–5 (e); see *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980).

decisions that are long past. *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 463–464 (1975); see *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 558 (1977).

Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the "unlawful employment practice" of which he complains. Ricks now insists that discrimination motivated the College not only in denying him tenure, but also in terminating his employment on June 30, 1975. Tr. of Oral Arg. 25, 26, 31–32. In effect, he is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his 1-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. *United Air Lines, Inc.* v. *Evans*, *supra*, at 558. If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts.[8]

Indeed, the contrary is true. It appears that termination of employment at Delaware State is a delayed, but inevitable,

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[8] Sixteen paragraphs in the complaint describe in detail the sequence of events surrounding the tenure denial. Only one paragraph even mentions Ricks' eventual departure from Delaware State, and nothing in that paragraph alleges any fact suggesting discrimination in the termination of Ricks' employment.

The complaint does allege that a variety of unusual incidents occurred during the 1974–1975 school year, including one in which the education department chairman, George W. McLaughlin, physically attacked Ricks. This incident allegedly resulted in McLaughlin's conviction for assault. Counsel for Ricks conceded at oral argument that incidents such as this were not independent acts of discrimination, Tr. of Oral Arg. 29–30, but at most evidence that could be used at a trial.

consequence of the denial of tenure. In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. Rather, in accord with the College's practice, Ricks was offered a 1-year "terminal" contract, with explicit notice that his employment would end upon its expiration.

In sum, the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks.[9] That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Abramson* v. *University of Hawaii*, 594 F. 2d 202, 209 (1979) (emphasis added); see *United Air Lines, Inc.* v. *Evans*, 431 U. S., at 558. It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.*, at 557. The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present *violation* exists." *Id.*, at 558 (emphasis in original).

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[9] Complaints that employment termination resulted from discrimination can present widely varying circumstances. In this case the only alleged discriminatory act is the denial of tenure sought by a college professor, with the termination of employment not occurring until a later date. The application of the general principles discussed herein necessarily must be made on a case-by-case basis.

III

We conclude for the foregoing reasons that the limitations periods commenced to run when the tenure decision was made and Ricks was notified. The remaining inquiry is the identification of this date.

A

Three dates have been advanced and argued by the parties. As indicated above, Ricks contended for June 30, 1975, the final date of his "terminal" contract, relying on a continuing-violation theory. This contention fails, as we have shown, because of the absence of any allegations of facts to support it. The Court of Appeals agreed with Ricks that the relevant date was June 30, 1975, but it did so on a different theory. It found that the only alleged discriminatory act was the denial of tenure, 605 F. 2d, at 711, but nevertheless adopted the "final date of employment" rule primarily for policy reasons. *Supra*, at 255–256. Although this view has the virtue of simplicity,[10] the discussion in Part II of this opinion demonstrates its fallacy as a rule of general application. Congress has decided that time limitations periods commence with the date of the "alleged unlawful employment practice." See 42 U. S. C. § 2000e-5 (e). Where, as here, the only challenged employment practice occurs before the termination date, the limitations periods necessarily commence to run before that date.[11] It should not be forgotten that time-limitations provisions themselves promote important interests; "the period

[10] Brief for EEOC as *Amicus Curiae* 19–22; 605 F. 2d, at 712–713.

[11] The Court of Appeals also thought it was significant that a final-date-of-employment rule would permit the teacher to conclude his affairs at a school without the acrimony engendered by the filing of an administrative complaint or lawsuit. *Id.*, at 712. It is true that "the filing of a lawsuit might tend to deter efforts at conciliation." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S., at 461. But this is the "natural effec[t] of the choice Congress has made," *ibid.*, in explicitly requiring that the limitations period commence with the date of the "alleged unlawful employment practice," 42 U. S. C. § 2000e-5 (e).

allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S., at 463–464.[12] See *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 820, 825 (1980).

B

The EEOC, in its *amicus* brief, contends in the alternative for a different date. It was not until September 12, 1974, that the Board notified Ricks that his grievance had been denied. The EEOC therefore asserts that, for purposes of computing limitations periods, this was the date of the unfavorable tenure decision.[13] Two possible lines of reasoning underlie this argument. First, it could be contended that the Trustees' initial decision was only an expression of intent that did not become final until the grievance was denied. In support of this argument, the EEOC notes that the June 26 letter explicitly held out to Ricks the possibility that he would receive tenure if the Board sustained his grievance. See n. 2, *supra*. Second, even if the Board's first decision

[12] It is conceivable that the Court of Appeals' "final day of employment" rule might discourage colleges even from offering a "grace period," such as Delaware State's practice of 1-year "terminal" contracts, during which the junior faculty member not offered tenure may seek a teaching position elsewhere.

[13] If September 12 were the critical date, the § 1981 claim would be timely. Counting from September 12, the Title VII claim also would be timely if Ricks is entitled to 300 days, rather than 180 days, in which to file with the EEOC. In its brief before this Court, the EEOC as *amicus curiae* noted that Delaware is a State with its own fair employment practices agency. According to the EEOC, therefore, Ricks was entitled to 300 days to file his complaint. See n. 7, *supra*. Because we hold that the time-limitations periods commenced to run no later than June 26, 1974, we need not decide whether Ricks was entitled to 300 days to file under Title VII. Counting from the June 26 date, Ricks' filing with the EEOC was not timely even with the benefit of the 300-day period.

expressed its official position, it could be argued that the pendency of the grievance should toll the running of the limitations periods.

We do not find either argument to be persuasive. As to the former, we think that the Board of Trustees had made clear well before September 12 that it had formally rejected Ricks' tenure bid. The June 26 letter itself characterized that as the Board's "official position." *Ibid.* It is apparent, of course, that the Board in the June 26 letter indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.

As to the latter argument, we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229 (1976).[14] The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made. Cf. *id.*, at 234–235.[15]

C

The District Court rejected both the June 30, 1975, date and the September 12, 1974, date, and concluded that the limitations periods had commenced to run by June 26, 1974, when the President of the Board notified Ricks that he would be offered a "terminal" contract for the 1974–1975 school

[14] See also B. Schlei & P. Grossman, Employment Discrimination Law 235 (1979 Supp.), and cases cited therein.

[15] We do not suggest that aspirants for academic tenure should ignore available opportunities to request reconsideration. Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws.

year. We cannot say that this decision was erroneous. By June 26, the tenure committee had twice recommended that Ricks not receive tenure; the Faculty Senate had voted to support the tenure committee's recommendation; and the Board of Trustees formally had voted to deny Ricks tenure.[16] In light of this unbroken array of negative decisions, the District Court was justified in concluding that the College had established its official position—and made that position apparent to Ricks—no later than June 26, 1974.[17]

We therefore reverse the decision of the Court of Appeals and remand to that court so that it may reinstate the District Court's order dismissing the complaint.

Reversed and remanded.

JUSTICE STEWART, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I agree with the Court that the unlawful employment practice alleged in the respondent's complaint was a discrimina-

[16] We recognize, of course, that the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes. See *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 761 (1979); *Love* v. *Pullman Co.*, 404 U. S. 522, 526–527 (1972). But, for the reasons we have stated, there can be no claim here that Ricks was not abundantly forewarned. In *NLRB* v. *Yeshiva University*, 444 U. S. 672, 677 (1980), we noted that university boards of trustees customarily rely on the professional expertise of the tenured faculty, particularly with respect to decisions about hiring, tenure, termination, and promotion. Thus, the action of the Board of Trustees on March 13, 1974, affirming the faculty recommendation, was entirely predictable. The Board's letter of June 26, 1974, simply repeated to Ricks the Board's official position and acknowledged the pendency of the grievance through which Ricks hoped to persuade the Board to change that position.

[17] We need not decide whether the District Court correctly focused on the June 26 date, rather than the date the Board communicated to Ricks its unfavorable tenure decision made at the March 13, 1974, meeting. As we have stated, see n. 13, *supra*, both the Title VII and § 1981 complaints were not timely filed even counting from the June 26 date.

tory denial of tenure, not a discriminatory termination of employment. See *ante*, at 257–259, and nn. 8, 9. Nevertheless, I believe that a fair reading of the complaint reveals a plausible allegation that the College actually denied Ricks tenure on September 12, 1974, the date on which the Board finally confirmed its decision to accept the faculty's recommendation that he not be given tenure.

Therefore, unlike the Court, I think Ricks should be allowed to prove to the District Court that the allegedly unlawful denial of tenure occurred on that date.[1] As noted by the Court, see *ante*, at 260, n. 13, if Ricks succeeds in this proof, his § 1981 claim would certainly be timely, and the timeliness of his Title VII claim would then depend on whether his filing of a complaint with the Delaware Department of Labor entitled him to file his EEOC charge within 300 days of the discriminatory act, rather than within the 180 days' limitation that the Court of Appeals and the District Court assumed to be applicable.[2]

A brief examination of the June 26, 1974, letter to Ricks

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[1] The Court treats the District Court's determination of June 26, 1974, as the date of tenure denial as a factual finding which is not clearly erroneous. *Ante*, at 261–262. But it must be stressed that the District Court dismissed Ricks' claims on the pleadings, and so never made factual determinations on this or any other issue.

[2] Title VII would allow Ricks 300 days if he had "initially instituted" proceedings with a local or state agency with authority to grant him relief. 42 U. S. C. § 2000e–5 (e); see *Mohasco Corp.* v. *Silver*, 447 U. S. 807. To benefit from this provision, however, Ricks would arguably have had to make a timely filing with the state agency. Delaware law requires that a charge of discrimination be filed with the Department of Labor within 90 days after the allegedly discriminatory practice occurred or within 120 days after the practice is discovered, whichever date is later. Del. Code Ann., Tit. 19, § 712 (d) (1979). Neither the District Court nor the Court of Appeals considered the timeliness of Ricks' filing with the state agency, nor the significance of the state agency's action in waiving jurisdiction over Ricks' charge, and so these questions would be appropriately addressed on remand.

from the Board of Trustees, quoted by the Court, *ante*, at 253, n. 2, provides a reasonable basis for the allegation that the College did not effectively deny Ricks tenure until September 12. The letter informed Ricks of the Board's "intent not to renew" his contract at the end of the 1974–1975 academic year. And the letter suggested that the Board was so informing Ricks at that time only to ensure technical compliance with College and American Association of University Professors requirements in case it should *later* decide to abide by its earlier acceptance of the faculty's recommendation that Ricks be denied tenure. The Board expressly stated in the letter that it had "no way of knowing" what the outcome of the grievance process might be, but that a decision of the Board's Educational Policy Committee favorable to Ricks would "of course . . . supersede any previous action taken by the Board."

Thus, the Board itself may have regarded its earlier actions as tentative or preliminary, pending a thorough review triggered by the respondent's request to the Committee. The Court acknowledges that this letter expresses the Board's willingness to change its earlier view on Ricks' tenure, but considers the grievance procedure under which the decision might have been changed to be a remedy for an earlier tenure decision and not a part of the overall process of making the initial tenure decision. Ricks, however, may be able to prove to the District Court that at his College the original Board response to the faculty's recommendation was not a virtually final action subject to reopening only in the most extreme cases, but a preliminary decision to advance the tenure question to the Board's grievance committee as the next conventional stage in the process.[5]

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[5] This view is consistent with the policies and model procedures of the American Association of University Professors, AAUP Policy Documents and Reports 15, 29 (1977); see *Board of Regents* v. *Roth*, 408 U. S. 564, 578–579, and n. 17; Brief for AAUP as *Amicus Curiae* 9–10, on whose

Whether this is an accurate view of the tenure process at Delaware State College is, of course, a factual question we cannot resolve here. But Ricks lost his case in the trial court on a motion to dismiss. I think that motion was wrongly granted, and that Ricks was entitled to a hearing and a determination of this factual issue. See *Abramson* v. *University of Hawaii*, 594 F. 2d 202 (CA9).

I would, therefore, vacate the judgment of the Court of Appeals and remand the case to the District Court so that it can make this determination and then, if necessary, resolve whether Title VII allowed Ricks 300 days from the denial of tenure to file his charge with the Commission.

JUSTICE STEVENS, dissenting.

The custom widely followed by colleges and universities of offering a 1-year terminal contract immediately after making an adverse tenure decision is, in my judgment, analogous to the custom in many other personnel relationships of giving an employee two weeks' advance notice of discharge. My evaluation of this case can perhaps best be explained by that analogy.

Three different reference points could arguably determine when a cause of action for a discriminatory discharge accrues: (1) when the employer decides to terminate the relationship; (2) when notice of termination is given to the employee; and (3) when the discharge becomes effective. The most sensible rule would provide that the date of discharge establishes the time when a cause of action accrues and the statute of limitations begins to run. Prior to that date, the allegedly wrongful act is subject to change; more importantly, the effective discharge date is the date which can normally be identified with the least difficulty or dispute.[1]

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requirements the Board of Trustees in this case expressly relied in explaining its action in the June 26 letter.

[1] Although few courts have had the occasion to consider the issue in

I would apply the same reasoning here in identifying the date on which respondent's allegedly discriminatory discharge became actionable. See *Egelston* v. *State University College at Geneseo*, 535 F. 2d 752, 755 (CA2 1976). Thus under my analysis the statute of limitations began to run on June 30, 1975, the termination date of respondent's 1-year contract. In reaching that conclusion, I do not characterize the College's discharge decision as a "continuing violation"; nor do I suggest that a teacher who is denied tenure and who remains in a school's employ for an indefinite period could file a timely complaint based on the tenure decision when he or she is ultimately discharged. Rather, I regard a case such as this one, in which a college denies tenure and offers a terminal 1-year contract as part of the adverse tenure decision, as a discharge case. The decision to deny tenure in this situation is in all respects comparable to another employer's decision to discharge an employee and, in due course, to give the employee notice of the effective date of that discharge. Both the interest in harmonious working relations during the terminal period of the employment relationship,[2] and the inter-

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the context of notice of discharge preceding actual termination, some courts have recognized that the date on which the employee actually ceases to perform services for the employer, and not a later date when the payment of benefits or accrued vacation time ceases, should determine the running of the statute of limitations. See *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187, 192 (CA3 1977), cert. denied, 439 U. S. 821 (1978); *Krzyzewski* v. *Metropolitan Government of Nashville and Davidson County*, 584 F. 2d 802, 804–805 (CA6 1978).

[2] This interest has special force in the college setting. Because the employee must file a charge with the EEOC within 180 days after the occurrence, the Court's analysis will necessitate the filing of a charge while the teacher is still employed. The filing of such a charge may prejudice any pending reconsideration of the tenure decision and also may impair the teacher's performance of his or her regular duties. Neither of these adverse consequences would be present in a discharge following a relatively short notice such as two weeks.

est in certainty that is so important in litigation of this kind,[3] support this result.

For these reasons, I would affirm the judgment of the Court of Appeals.

[3] The interest in certainty lies not only in choosing the most easily identifiable date, but also in avoiding the involvement of the EEOC until the school's decision to deny tenure is final. The American Association of University Professors, as *amicus curiae* here, has indicated that under the "prevailing academic employment practices" of American higher education, which allow for maximum flexibility in tenure decisions, initial tenure determinations are often reconsidered, and the reconsideration process may take the better part of the terminal contract year. Brief for American Association of University Professors as *Amicus Curiae* 6–11.

POTOMAC ELECTRIC POWER CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-816. Argued October 8, 1980—Decided December 15, 1980

Under the Longshoremen's and Harbor Workers' Compensation Act, compensation for a permanent partial disability must be determined in one of two ways. First, if the injury is of a kind specifically identified in the schedule set forth in §§ 8 (c) (1)–(20) of the Act, the injured employee is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has been impaired. Second, in "all other cases," § 8 (c) (21) authorizes compensation equal to two-thirds of the difference between the employee's preinjury average weekly wages and his postinjury wage-earning capacity, during the period of his disability. Respondent employee (an employee covered by the Act) in the course of his employment suffered a permanent partial loss of the use of his left leg, an injury specified in the statutory schedule. But the Administrative Law Judge, rather than awarding him compensation under the schedule, allowed him the larger recovery under § 8 (c) (21), and the Benefits Review Board affirmed. The Court of Appeals also affirmed, concluding that the "all other cases" language in § 8 (c) (21) provided a "remedial alternative" measure of compensation for cases in which the scheduled benefits failed adequately to compensate for a diminution in wage-earning capabilities.

Held: Respondent employee's recovery must be limited by the statutory schedule. Pp. 273–284.

(a) There is nothing in the language of the Act itself to support the view that the reference to "all other cases" in § 8 (c) (21) was intended to authorize an alternative method for computing disability benefits in certain cases of permanent partial disability already provided for in the statutory schedule. Pp. 273–274.

(b) The Act's legislative history is entirely consistent with the conclusion that it was intended to mean what it says. Pp. 275–276.

(c) The weight of judicial authority also supports a literal reading of the Act. Pp. 276–280.

(d) It is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities, but rather, like most workmen's compensation legislation, the Act represents a compromise between the competing interests of disabled laborers and their employers. The use of a schedule of fixed benefits as an exclusive remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible. Pp. 280–284.

196 U. S. App. D. C. 417, 606 F. 2d 1324, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 284.

Richard W. Turner argued the cause for petitioner. With him on the briefs was *Stephen A. Trimble.*

Elinor Hadley Stillman argued the cause for the federal respondent. With her on the brief were *Solicitor General McCree, Deputy Solicitor General Geller, Laurie M. Streeter,* and *Lois G. Williams. Leslie Scherr* argued the cause for respondent Cross. With him on the brief was *William F. Krebs.*

JUSTICE STEVENS delivered the opinion of the Court.

Under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, as amended, 33 U. S. C. §§ 901–950 (1976 ed. and Supp. III), compensation for a permanent partial disability must be determined in one of two ways. First, if the injury is of a kind specifically identified in the schedule set forth in §§ 8 (c)(1)–(20) of the Act, 33 U. S. C. §§ 908 (c)(1)–(20), the injured employee is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired. Second, in all other cases, § 8 (c)(21), 33 U. S. C. § 908 (c)(21), authorizes compensation equal to two-thirds of the difference between the

employee's preinjury average weekly wages and his postinjury wage-earning capacity, during the period of his disability.[1] The question in this case is whether a permanently partially disabled employee, entitled to compensation under the statutory schedule, may elect to receive a larger recovery under § 8 (c)(21) measured by the actual impairment of wage-earning capacity caused by his injury. Although Congress could surely authorize such an election, it has not yet done so.

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[1] Section 8, as set forth in 33 U. S. C. § 908, provides, in part, as follows:

"Compensation for disability shall be paid to the employee as follows:

. . . . . .

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

"(2) Leg lost, two hundred and eighty-eight weeks' compensation.

"(3) Hand lost, two hundred and forty-four weeks' compensation.

"(4) Foot lost, two hundred and five weeks' compensation.

"(5) Eye lost, one hundred and sixty weeks' compensation.

. . . . . .

"(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

"(20) Disfigurement: Proper and equitable compensation not to exceed $3,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

"(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

We therefore hold that respondent Cross' recovery must be limited by the statutory schedule.

Cross is employed by Potomac Electric Power Co. (Pepco) as a cable splicer—a job that requires strength and agility. In 1974, he earned a total of $21,959.38, including overtime pay of $8,543.30. In December of that year, he injured his left knee in the course of his employment, thereby suffering a permanent partial loss of the use of his leg. The physical impairment is described as a 5 to 20% loss of the use of one leg, but the resulting impairment of his earning capacity is apparently in excess of 40%.[2] Although Cross has retained his job, he has not been able to perform all of the strenuous duties required of a cable splicer and therefore he has received no overtime and has not qualified for certain pay increases.

Because he worked in the District of Columbia, respondent Cross is entitled to compensation under the LHWCA.[3] It is undisputed that the injury to his leg is a "permanent partial disability" within the meaning of § 8 (c) of the Act; he therefore has an unquestioned right to a compensation award measured by a fraction of his earnings for 288 weeks.[4]

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[2] Cross' 1975 earnings amounted to $12,086.48, in contrast to 1974 earnings of $21,959.38.

[3] The District of Columbia Workmen's Compensation Act, D. C. Code §§ 36–501 to 36–504 (1973 and Supp. V–1978), adopts the LHWCA as the workmen's compensation law for the District of Columbia. See *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 471 (1947). Section 1 of the Act, D. C. Code § 36–501 (1973), provides:

"The provisions of chapter 18 of title 33, U. S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person."

[4] Under §§ 8 (c) (2) and (18), an employee suffering a total loss of the use of one leg is entitled to receive two-thirds of his average weekly wages

His claim, however, is for the larger amount measured by two-thirds of the difference between his average weekly earnings before the injury and his present wage-earning capacity, multiplied by the number of weeks that his disability continues.[5]

The Administrative Law Judge allowed the larger recovery. He held that an injured employee is not required to accept the specific amount authorized by §§ 8 (c)(2) and (19) for the partial loss of the use of a leg, but instead may recover an amount based on the formula set forth in § 8 (c)(21) for "all other cases." Using that formula, the Administrative Law Judge found that respondent Cross' permanent loss of earning capacity amounted to approximately $130 per week, and ordered Pepco to pay him two-thirds of that amount each week for the remainder of his working life. The Benefits Review Board affirmed. *Cross* v. *Potomac Electric Power Co.*, 7 BRBS 10 (1977).

The United States Court of Appeals for the District of Columbia Circuit also affirmed. 196 U. S. App. D. C. 417,

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for a period of 288 weeks. If an injury results in a partial loss of the use of a scheduled member, as in this case, § 8 (c)(19) provides that compensation is to be calculated as a proportionate loss of the use of that member. Under the schedule, Cross is therefore entitled to receive two-thirds of his average weekly wages for whatever fraction of 288 weeks represents the proportionate loss of the use of his leg caused by the knee injury. Because this case was decided under § 8 (c)(21), rather than the schedule, it was not necessary for the Administrative Law Judge to determine the precise extent of respondent Cross' disability. The medical testimony indicates that he suffered a 5 to 20% loss of the use of his leg.

[5] This computation is derived from § 8 (c)(21), 33 U. S. C. § 908 (c)(21), quoted in n. 1, *supra*. It should be noted that "wage-earning capacity" under § 8 (c)(21) is not necessarily measured by an injured employee's actual postinjury earnings. Section 8 (h) of the Act, as set forth in 33 U. S. C. § 908 (h), provides:

"The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Pro-*

606 F. 2d 1324 (1979). Recognizing that the Act "must be construed in light of its humanitarian objectives," and noting a "recent trend in workmen's compensation law away from the idea of exclusivity of scheduled benefits," the court concluded that the "all other cases" language in § 8 (c)(21) provided a "remedial alternative" measure of compensation for cases in which "the scheduled benefits fail adequately to compensate for a diminution in [wage-earning] capabilities." [6] While expressing sympathy for the result reached by the majority, one judge dissented.[7]

I

The language of the Act plainly supports the view that the character of the disability determines the method of compensation. Section 8 identifies four different categories of disability and separately prescribes the method of compensation

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vided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

[6] 196 U. S. App. D. C., at 420–421, 606 F. 2d, at 1327–1328.

[7] Before analyzing the statute and its history in detail, Judge MacKinnon wrote:

"Nothing in section 8 permits an employee whose injury is unquestionably confined to one of those set out in the schedule to circumvent Congress' conclusive presumptions with a showing of lost earning capacity in excess of the specified benefit. The majority holds otherwise, and does so despite the fact that during the fifty-two year old regime of an essentially unaltered statutory scheme no federal court has ever read section 8 in that manner while a number of federal courts have adopted a contrary approach. I am not unsympathetic to the result the majority's holding achieves, but I submit that it is within the province of the legislative branch to weigh and decide whether this result ought to obtain." *Id.*, at 422–423, 606 F. 2d, at 1329–1330.

for each.[8] In the permanent partial disability category, § 8 (c) provides a compensation schedule which covers 20 different specific injuries. It then adds an additional subparagraph, § 8 (c)(21), that applies to any injury not included within the list of specific injuries. There is no language in that additional subparagraph indicating that it was intended to provide an alternative method of compensation for the cases described in the preceding subparagraphs; quite the contrary, by its terms, subparagraph (21) is applicable "In all other cases." [9]

It is also noteworthy that the statutory direction that precedes the schedule of specifically described partial disabilities mandates that the compensation prescribed by the schedule *"shall* be paid to the employee, as follows." [10] We are not free to read this language as though it granted the employee an election. Nor are we free to read the subsequent words "all *other* cases" as though they described "all of the foregoing" as well; the use of the word "other" forecloses that reading.

In sum, we find nothing in the statute itself to support the view that the reference to "all other cases" in § 8 (c)(21) was intended to authorize an alternative method for computation of disability benefits in certain cases of permanent partial disability already provided for in the schedule.

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[8] In addition to permanent partial disability, the Act provides for permanent total, temporary total, and temporary partial disability. The remedies for permanent and temporary total disability—essentially two-thirds of the employee's average weekly wages during the period of the disability—are set forth in subsections (a) and (b) of § 8, 33 U. S. C. §§ 908 (a) and (b). The remedy for temporary partial disability—two-thirds of the difference between the employee's preinjury average weekly wages and his postinjury wage-earning capacity during the period of disability, up to a maximum of five years—is set forth in § 8 (e), 33 U. S. C. § 908 (e).

[9] Indeed, it should be noted that the words "other cases" appear twice in subparagraph (21). See n. 1, *supra.*

[10] 33 U. S. C. § 908 (c) (emphasis supplied). See n. 1, *supra.*

II

The legislative history of the Act is entirely consistent with the conclusion that it was intended to mean what it says. Although that history contains no specific consideration of the precise question before us,[11] one aspect of the Act's history is somewhat enlightening. The relevant language was enacted in 1927.[12] It was patterned after a similar "scheduled benefits" provision in the New York Workmen's Compensation Law enacted in 1922.[13] A few years after enactment of the LHWCA, the New York Court of Appeals was confronted with the same question of construction under the New York statute that is now presented to us under the federal statute. The New York Court of Appeals apparently considered the statutory language so clear on its face that little discussion of this issue was necessary:

> "Obviously, the phrase 'in all other cases' signifies that the provisions of the paragraph shall apply only in cases where the injuries received are not confined to a specific

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[11] Judge MacKinnon's dissenting opinion reviewed the legislative history in detail; although he discovered no clear answer to the exclusivity question, see 196 U. S. App. D. C., at 425, 606 F. 2d, at 1332, he found that, to the extent any conclusions could be drawn, the legislative history supported the view that the schedule and "all other cases" categories were intended to be mutually exclusive. *Id.*, at 425–429, 606 F. 2d, at 1332–1336.

[12] Act of Mar. 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*

[13] 1922 N. Y. Laws, ch. 615, § 15 (3). The 1922 Act was an extensive revision of the Workmen's Compensation Law of 1914, 1914 N. Y. Laws, ch. 41. A schedule covering particular cases of permanent partial disability initially appeared in the 1914 Act. See 1914 N. Y. Laws, ch. 41, § 15 (3). This schedule was retained, in a slightly revised form, in the 1922 Act. The schedule adopted by Congress in the LHWCA was substantially identical to the New York schedule of 1922. Congress selected the New York statute as the model for the LHWCA because that statute was considered one of the best workmen's compensation laws of its time. See H. R. Rep. No. 1190, 69th Cong., 1st Sess., 2 (1926).

member or specific members." *Sokolowski* v. *Bank of America*, 261 N. Y. 57, 62, 184 N. E. 492, 494 (1933).

Nothing in the original legislative history of the federal Act or in the legislative history of subsequent amendments [14] indicates that Congress did not intend the plain language of the federal statute to receive the same construction as the substantially identical language of its New York ancestor.

III

The weight of judicial authority also supports a literal reading of the Act.

During the first half century of administration of the LHWCA, federal tribunals consistently construed the schedule benefits provision as exclusive. Although the exclusivity question did not explicitly arise until 1964, prior to that time

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[14] In 1972, Congress considered and failed to pass an amendment to § 8 (c) that would have permitted an employee suffering from a permanent partial disability caused by a scheduled injury to recover *both* the schedule benefits and two-thirds of his lost wage-earning capacity after expiration of the schedule period. See S. 2318, § 7, 92d Cong., 2d Sess. (1971), reprinted in Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 7 (1972); H. R. 12006, § 7, 92d Cong., 1st Sess. (1971), and H. R. 15023, § 7, 92d Cong., 2d Sess. (1972), reprinted in Longshoremen's and Harbor Workers' Compensation Act: Hearings before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess., 27, 38 (1972). Although Pepco relies heavily upon Congress' rejection of this proposed amendment as support for its position that schedule benefits are exclusive, this action is of marginal relevance in this case because the amendment would have authorized cumulative, not alternative, remedies. Pepco's reliance upon 1949 and 1966 amendments to the Federal Employees Compensation Act (FECA), 5 U. S. C. § 8101 *et seq.*, is similarly misplaced. These amendments, authorizing cumulative remedies under the FECA, shed little light upon Congress' intention with respect to alternative remedies under the LHWCA. See Act of Oct. 14, 1949, ch. 691, § 104, 63 Stat. 855; Act of Sept. 6, 1966, Pub. L. 89–554, 80 Stat. 536.

evidence of loss of wages or wage-earning capacity was considered irrelevant in cases of permanent partial disability falling within the schedule provisions.[15] In 1964, in *Williams* v. *Donovan*, 234 F. Supp. 135 (ED La.), aff'd, 367 F. 2d 825 (CA5 1966), cert. denied, 386 U. S. 977 (1967), the first federal court to address the exclusivity issue found that "the form and language of the Act" indicated that compensation under § 8 (c)(21) for loss of wage-earning capacity was not available in cases covered by the schedule. 234 F. Supp., at 139. This construction of the Act went unchallenged for the next decade.[16]

It was not until 1975 that the Benefits Review Board announced its dissatisfaction with the *Williams* construction of the statute and concluded that claimants suffering from a permanent partial disability may elect to proceed under either the schedule or § 8 (c)(21).[17] The Board has since applied

[15] See, *e. g.*, *Travelers Insurance Co.* v. *Cardillo*, 225 F. 2d 137, 143–144 (CA2), cert. denied, 350 U. S. 913 (1955). It should be noted, however, that this principle was announced in response to employer attempts to defeat an injured employee's claim for schedule benefits on the ground that the employee had suffered no actual loss of wages or wage-earning capacity. Prior to 1964, the federal courts apparently had not been confronted with an employee, entitled to compensation under the schedule, who attempted to secure a greater recovery by establishing an actual loss of wages or wage-earning capacity in excess of the schedule benefit.

[16] Although the question arose in a significantly different context, another 1964 decision, *Flamm* v. *Hughes*, 329 F. 2d 378, 380, suggests that the Court of Appeals for the Second Circuit considered the schedule and "other cases" provisions mutually exclusive.

[17] *Mason* v. *Old Dominion Stevedoring Corp.*, 1 BRBS 357, 363–365 (1975). In *Mason*, the Board rejected *Williams* in favor of *American Mutual Insurance Co.* v. *Jones*, 138 U. S. App. D. C. 269, 426 F. 2d 1263 (1970), a decision upon which the court below also relied. See 196 U. S. App. D. C., at 421, 606 F. 2d, at 1328. The opinion in *Jones*, however, does not address the exclusivity issue presented in this case. Rather, *Jones* held merely that a scheduled injury can give rise to an award for permanent total disability under § 8 (a) where the facts establish that the injury prevents the employee from engaging in the only employment for which

its construction of the Act in a series of decisions of which the instant case is a member.[18] The divided opinion of the Court of Appeals is apparently the first and only federal court de-

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he is qualified. 138 U. S. App. D. C., at 271–272, 426 F. 2d, at 1265–1266. This conclusion is entirely consistent with the statute which, in § 8 (a), directs that "permanent total disability shall be determined in accordance with the facts." 33 U. S. C. § 908 (a). Indeed, since the § 8 (c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant. The question presented in *Mason* and in this case is the very different question of whether § 8 (c) permits an employee suffering from a disability determined to be partial in character to choose between recovery under the schedule and recovery under § 8 (c) (21). The Court of Appeals for the Fifth Circuit recently recognized this distinction when it noted that *Williams* and *Jones* are in no way inconsistent, because the former concerns partial disability while the latter concerns total disability. See *Jacksonville Shipyards, Inc.* v. *Dugger*, 587 F. 2d 197, 198 (1979).

[18] See *Collins* v. *Todd Shipyards Corp.*, 9 BRBS 1015 (1979); *Brandt* v. *Avondale Shipyards, Inc.*, 8 BRBS 698 (1978); *Dugger* v. *Jacksonville Shipyards*, 8 BRBS 552 (1978); *Richardson* v. *Perna & Cantrell, Inc.*, 6 BRBS 588 (1977); *Longo* v. *Universal Terminal & Stevedoring Corp.*, 2 BRBS 357 (1975). It should be noted that two of these decisions, *Dugger* and *Longo*, involved permanent total, not permanent partial, disability; therefore, comments in those decisions pertaining to the exclusivity issue are dicta. See n. 17, *supra*. It should also be noted that the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts. See *Hastings* v. *Earth Satellite Corp.*, 202 U. S. App. D. C. 85, 94, 628 F. 2d 85, 94 (1980) cert. denied, *post*, p. 905; *Tri-State Terminals, Inc.* v. *Jesse*, 596 F. 2d 752, 757, n. 5 (CA7 1979).

In the Board's most recent examination of the exclusivity issue, *Collins* v. *Todd Shipyards, supra*, Chairman Smith vigorously dissented from the majority's conclusion that § 8 (c) (21) benefits are available for scheduled injuries. 9 BRBS, at 1027–1036. Chairman Smith acknowledged that the contrary construction could produce inequitable results, but concluded that the statutory language would support no other construction: "The statute is not ambiguous or indefinite. It needs no strained interpretation or construction. The statutory language contained in Section 8 (c) clearly indicates that the schedule awards and the Section 8 (c) (21)

cision accepting that construction. The notion that the plain language of the LHWCA might not mean what it says is thus a relatively recent development surfacing for the first time almost 50 years after its enactment. The relevant judicial authority prior to 1975, although not abundant, indicates that the schedule benefits were considered exclusive.

While the federal decisional authority on this question is scarce, state-law authority apparently is not. The lower court cited, and the respondents rely upon, the "recent trend in workmen's compensation law away from the idea of exclusivity of scheduled benefits." 196 U. S. App. D. C., at 421, 606 F. 2d, at 1328.[19] Although this "trend" unquestionably exists, it is neither uniform nor based entirely on cases presenting issues comparable to the precise issue before us.[20]

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awards are mutually exclusive. Sections 8 (c)(1) through (20) set forth the provisions and conditions for making schedule awards. Section 8 (c)(21) represents a clear line of demarcation from the schedule in that it applies to 'all other cases' in the permanent partial class of disability." *Id.*, at 1027.

[19] The majority quoted the following passage from a leading treatise on workmen's compensation law:

"'Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole.'" 196 U. S. App. D. C., at 214–215, 606 F. 2d, at 1328–1329, quoting 2 A. Larson, Workmen's Compensation Law § 58.20, pp. 10–212 to 10–214 (1976) (footnotes omitted).

[20] The trend away from exclusivity identified by Professor Larson has developed, at least in part, in cases involving scheduled injuries which result in either total disability or permanent partial disability extending in effect to other parts of the body. See *id.*, § 58.20, pp. 10–196 to 10–206, 10–214 to 10–220. We are concerned here solely with a case in which

More importantly, a proper understanding of the judicial role in this case reveals that the recent trend actually supports a literal reading of the federal statute. Our task is to ascertain the congressional intent underlying the schedule benefit provisions enacted in 1927; we are not free to incorporate into those provisions subsequent state-law developments that we may consider sound as a matter of policy. In attempting to ascertain the legislative intent underlying a statute enacted over 50 years ago, the view that once "dominate[d] the field" is more enlightening than a recent state-law trend that has not motivated subsequent Congresses to amend the federal statute.[21] The once dominant view is entirely consistent with a literal reading of the Act.

IV

Respondents suggest two reasons why this settled construction is erroneous. They submit that it does not fulfill the fundamental remedial purpose of the Act and that it may produce anomalous results that Congress probably did not intend. The first submission is not entirely accurate; the second, though theoretically correct, has insufficient force to overcome the plain language of the statute itself.

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a scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability.

With respect to the limited question before us, it appears that, despite the recent trend to the contrary, a significant number of jurisdictions continue to view schedule benefits as exclusive in cases of permanent partial disability. See, *e. g.*, E. Blair, Reference Guide to Workmen's Compensation Law § 11:07, p. 11–24 (1974); 11 W. Schneider, Workmen's Compensation § 2322 (a), pp. 562–565 (Perm. ed. 1957). Indeed, Professor Larson's treatise indicates that exclusivity, although perhaps no longer the majority view, nonetheless represents the view of "many jurisdictions." See 2 A. Larson, *supra*, § 58.00, p. 10–164; § 58.20, pp. 10–206 to 10–212; see also *id.*, § 58.13, p. 10–174.

[21] As Professor Larson noted in the passage quoted by the court below, "at one time the doctrine of exclusiveness of schedule allowances did dominate the field." *Id.*, § 58.20, p. 10–212, quoted in 196 U. S. App. D. C., at 421, 606 F. 2d, at 1328. See n. 19, *supra*.

Respondents correctly observe that prior decisions of this Court require that the LHWCA be liberally construed in order to effectuate its remedial purposes.[22] Respondents accordingly argue that the Act should be interpreted in a manner which provides a complete and adequate remedy to an injured employee. Implicit in this argument, however, is the assumption that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries. The inaccuracy of this implicit assumption undercuts the validity of respondents' argument.

The LHWCA, like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a certain recovery for employees who are injured on the job. It imposes liability without fault and precludes the assertion of various common-law defenses that had frequently resulted in the denial of any recovery for disabled laborers. While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss.[23] On the contrary, they provide employers with definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages. None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of

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[22] See, *e. g.*, *Reed* v. *The Yaka*, 373 U. S. 410, 415 (1963); *Voris* v. *Eikel*, 346 U. S. 328, 333 (1953); *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U. S. 408, 414 (1932).

[23] The LHWCA clearly does not attempt to compensate injured employees for their entire loss. In all four classes of disability covered by the Act, see n. 8, *supra*, the maximum compensation available is expressly designated to be less than an employee's actual economic loss. In this respect, the LHWCA is typical of most workmen's compensation statutes. See 1 A. Larson, *supra* n. 19, § 2.50, p. 11; Small, The General Structure of Law Applicable to Employee Injury and Death, 16 Vand. L. Rev. 1021, 1027–1028 (1963).

earnings. It therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers.[24] The use of a schedule of fixed benefits as an exclusive remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible.

It is true, however, that requiring resort to the schedule may produce certain incongruous results. Unless an injury

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[24] The compromise nature of workmen's compensation legislation is well recognized:

"Workmen's compensation acts are in the nature of a compromise or quid pro quo between employer and employee. Employers relinquish certain legal rights which the law affords to them and so, in turn, do the employees. Employers give up the common-law defenses of the fellow servant rule and assumption of risk. Employees are assured hospital and medical care and subsistence during the convalescence period. In return for a fixed schedule of payments and a fixed amount in the event of the worker's death, employers are made certain that irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries." 1 M. Norris, The Law of Maritime Personal Injuries § 55, p. 102 (3d ed. 1975).

See also E. Blair, *supra* n. 20, § 1:00, pp. 1–1 to 1–2; W. Prosser, Law of Torts 531–532 (4th ed. 1971). This Court has previously recognized that the concept of compromise is central to the LHWCA, as adopted by the District of Columbia Workmen's Compensation Act:

"A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents and to place on District of Columbia employers a limited and determinate liability." *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S., at 476.

results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity; in contrast, even though a scheduled injury may have no actual effect on an employee's capacity to perform a particular job or to maintain a prior level of income, compensation in the schedule amount must be paid. Conversely, the schedule may seriously undercompensate some employees like respondent Cross.[25] The result seems particularly unfair when his case is compared with an employee who suffers an unscheduled disability resulting in an equivalent impairment of earning capacity. Indeed, it is possible that the award for a serious temporary partial disability could exceed the amount scheduled for a permanent disability of like character.[26]

As this Court has observed in the past, it is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results. *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U. S. 408, 412–413 (1932). But if "compelling language" produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language.

[25] Under the schedule, Cross is entitled to an award of approximately $3,200 to $12,800, depending upon the ultimate conclusion with respect to the degree of his disability. See n. 4, *supra*. Under § 8 (c) (21), in contrast, Cross was awarded $86.76 per week for the remainder of his working life, which, according to counsel in this case, could amount to well over $100,000. Brief for Petitioner 9; Tr. of Oral Arg. 10, 31, 34, 36. This dramatic disparity may be partially attributable to the fact that Cross received an exceptional amount of overtime compensation in the year preceding his injury.

[26] It is possible that, had Cross' disability been temporary in duration, he might have been entitled to a larger recovery than is available under the schedule for his permanent disability. On the basis of the evidence presented below, the maximum award available to Cross under the schedule is approximately $12,800. Because compensation for temporary partial disability under § 8 (e) is based upon lost wage-earning capacity rather than a schedule, Cross could have received approximately $22,400 for a temporary partial disability, assuming that the loss of wage-earning capacity demonstrated in this case was found to continue for the 5-year maximum temporary partial disability period. See 33 U. S. C. § 908 (e).

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Id., at 413. Such compelling statutory language is present in this case. See Part I, *supra*. The fact that it leads to seemingly unjust results in particular cases does not give judges a license to disregard it.[27]

If anomalies actually do occur with any frequency in the day-to-day administration of the Act, they provide a persuasive justification for a legislative review of the statutory compensation schedule. It would obviously be sound policy for Congress to re-examine the schedule of permanent partial disability benefits more frequently than every half century.[28] In such a re-examination the extent and importance of hypothetical cases such as those described by respondents could be fairly evaluated. In this judical proceeding, however, concern with such hypothetical cases is less compelling than sympathy for the actual plight of the individual litigant in the case before us. Nonetheless, that sympathy is an insufficient basis for approving a recovery that Congress has not authorized.

The judgment is

Reversed.

JUSTICE BLACKMUN, dissenting.

The Court in this case and the dissent in the Court of Appeals argue rather persuasively (but, for me, not convincingly) that, although they reach an incongruous result, see

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[27] AS THE CHIEF JUSTICE, writing for the Court, stated in another case in which plain statutory language led to a seemingly incongruous result:

"Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *TVA* v. *Hill*, 437 U. S. 153, 194 (1978).

[28] Compensation for permanent partial disability apparently presents particularly complex and troublesome problems in the workmen's compensation field. See generally Burton, Permanent Partial Disabilities and Workers' Compensation, 53 J. Urb. L. 853 (1976). Such problems are appropriately solved by legislative, not judicial, action. Although § 8 (c) has been amended in minor respects since its enactment, the present

ante, at 282–284, the statute is to be construed in favor of that incongruity and of the anomalies that concededly exist. It is said that this is so because Congress just wrote the statute that way. Now that the Court has so ruled, the Congress fortunately can remedy the anomalous situation if only it will go about doing it.

That, of course, is of no help or comfort to respondent Cross, the particular litigant here, who suffered the injury and who, as the Court concedes, *ante*, at 283, might have had a *greater* award had his injury been *less* enduring. That does not make much sense to me and, while I realize that statutory inequities occasionally exist in the area of workmen's compensation where seemingly arbitrary lines must be drawn somewhere, I cannot believe that by the language of this statute Congress intended such a result.

Soon after the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, 33 U. S. C. §§ 901–950, became law in 1927, this Court unanimously announced the principles to be applied in resolving questions of statutory construction that arise under it:

> "The measure before us, like recent similar legislation in many States, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results."

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schedule is substantially identical to the schedule included in the Act in 1927.

Baltimore & Phila. Steamboat Co. v. *Norton*, 284 U. S. 408, 414 (1932).

See also *Voris* v. *Eikel*, 346 U. S. 328, 333 (1953).

Today's decision departs from these principles by reaching, rather than avoiding, a harsh and incongruous result.[1] It is undisputed that respondent Cross has suffered an injury that will reduce his weekly earnings by $130.13 for the rest of his working life. To compensate him for this injury, the Benefits Review Board awarded him two-thirds of his lost earnings—$86.76 per week or approximately $4,500 per year—for as long as he continues to work. Under the Court's decision, however, the most that Cross will receive is a *total* of about $12,800,[2] less than three years' compensation as awarded by the Board. If the Board now accepts petitioner's argument that Cross has lost only 5% of the use of his leg, he will

[1] The Court's decision also rejects the consistent interpretation of the Benefits Review Board, the agency which administers the LHWCA. In four cases, in addition to this one, the Board has ruled that the schedule of benefits set out in §§ 908 (c)(1) to (20) is not the exclusive method of compensation for an employee who suffers permanent partial disability from a scheduled injury. *Collins* v. *Todd Shipyards Corp.*, 9 BRBS 1015 (1979); *Brand* v. *Avondale Shipyards, Inc.*, 8 BRBS 698 (1978); *Richardson* v. *Perna & Cantrell, Inc.*, 6 BRBS 588 (1977); *Mason* v. *Old Dominion Stevedoring Corp.*, 1 BRBS 357 (1975). Cf. *American Mutual Ins. Co.* v. *Jones*, 138 U. S. App. D. C. 269, 426 F. 2d 1263 (1970); *Dugger* v. *Jacksonville Shipyards*, 8 BRBS 552 (1978), aff'd, 587 F. 2d 197 (CA5 1979); *Longo* v. *Universal Terminal & Stevedoring Corp.*, 2 BRBS 357 (1975) (employee who suffers permanent total disability due to a scheduled injury is not limited to compensation provided by the schedule).

[2] The Administrative Law Judge found that respondent Cross' average weekly wage was $332.48. The schedule of benefits provides that a worker who completely loses the use of a leg shall receive two-thirds of his average weekly wage for 288 weeks. § 908 (c)(2). Because Cross lost no more than 20% of the use of his leg, the most he can recover under the schedule is 20% of the compensation awarded for the total loss of the use of a leg. § 908 (c)(19). Therefore, the maximum amount available to him under the schedule is $332.48 × ⅔ × 288 × 20% = $12,767.23.

receive about $3,200, less than one year's compensation.[3] Of course, if Congress really intended such a result, the Court would be powerless to change it. I believe, however, that neither the language of the statute nor its legislative history warrants the interpretation that the Court adopts.

The starting point, of course, is the statute's definition of "disability." Section 2 (10) of the Act, 33 U. S. C. § 902 (10), defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." As used in the Act, therefore, "disability" is an economic concept, rather than a medical one. An injury is not compensable under the Act unless it results in some diminution in the employee's earning power.

Not surprisingly, then, the amount of compensation that the Act provides depends upon the amount of wages lost by the injured employee due to his injury. A worker who suffers permanent total disability, and therefore is unable to earn any wages, receives two-thirds of his average weekly wages. § 908 (a). One who suffers temporary total disability receives two-thirds of his average weekly wages as long as he remains disabled. § 908 (b). One who suffers temporary partial disability receives two-thirds of the difference between his average weekly wages before the injury and his wage-earning capacity after the injury, payable as long as the disability continues, but not longer than five years. § 908 (e).

The Act's treatment of permanent partial disability should be read against this background. As the Court notes, § 908 (c) contains 20 subsections establishing compensation for permanent partial disability caused by particular injuries. That compensation is two-thirds of the worker's weekly wages for a specified number of weeks for the injury listed. Subsection (21) then provides that "[i]n all other cases in this

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[3] $332.48 × ⅔ × 288 × 5% = $3,191.81.

class of disability" an employee shall receive two-thirds of the difference between his average weekly wages before the injury and his wage-earning capacity thereafter. The Court prefers to construe "other cases" to mean that the compensation specified for the injuries listed in subsections (1) to (20) is the exclusive method of compensating workers who are permanently, but partially, disabled by these injuries. I believe that "other cases" includes any case in which the worker does not wish to accept the compensation offered in subsections (1) to (20), but elects to bear the burden of proving the difference between his wages before the injury and his wage-earning capacity afterwards.

This interpretation is far more in harmony with the overall purpose of the Act than is the Court's construction. The House Committee that considered the legislation explained that workers' compensation "has come to be universally recognized as a necessity in the interest of social justice between employer and employee," and that this Act would provide an injured worker with "compensation *during the period of his illness or inability to pursue his usual employment . . .*" (Emphasis added.) H. R. Rep. No. 1767, 69th Cong., 2d Sess., 19–20 (1927).[4] The compensation that the Court's decision provides to respondent Cross falls far short of this goal.

An additional purpose of the statute was to afford prompt relief to covered workers "without the delay and expense which an action at law entails." *Id.*, at 20. The inclusion of a schedule of benefits in § 908 (c) serves this goal by providing an easily ascertainable award to a person who suffers one of the scheduled injuries.[5] There is no indication in the

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[4] It is significant that this language appears in the House Committee's Report, since that Committee amended the bill to provide for the schedule of benefits after it had passed in the Senate without a schedule. See 67 Cong. Rec. 10614 (1926).

[5] Compare S. Rep. No. 836, 81st Cong., 1st Sess., 17 (1949), discussing an amendment that provides a schedule of benefits, similar to that con-

legislative history, however, that providing prompt and certain relief is to be regarded as more important than providing adequate relief, especially in a case, such as this one, in which it is undisputed that the schedule of benefits will not com-

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tained in the LHWCA, for the Federal Employees Compensation Act (FECA):

"Under the present act an employee may receive compensation to the extent of 66⅔ percent of whatever loss he has sustained in wage-earning capacity as caused by the injury. Unless the injury results in wage loss, no compensation can be paid. The absence of a schedule covering members and functions of the body has presented two principal difficulties, the first of which is the extreme difficulty in determining fairly and objectively the precise extent to which a particular physical impairment diminishes the injured employee's wage-earning capacity."

The Court of Appeals appropriately noted that on occasion the schedule may overcompensate a claimant. For example, a lawyer who loses an arm due to an accident at work may not suffer any diminution in his earning ability, but he would be eligible for compensation under the schedule. 196 U. S. App. D. C. 417, 421, n. 28, 606 F. 2d 1324, 1328, n. 28 (1979). To this extent, the schedule is an exception to the principle that disability is an economic concept rather than a medical one, but it is an exception that Congress deliberately chose to make. In addressing the second of the "principal difficulties" presented by the then absence of a schedule in the FECA, the Senate Report concluded:

"A particular physical impairment to a member or function of the body does not always cause a proportional reduction in earning capacity. An employee having a loss of a member or function may be able to return to employment without apparent wage loss. In that event, notwithstanding the severe physical loss to him, he may not under the present act be paid compensation for his physical impairment. It is understandable that employees with such losses expect some form of indemnity for their loss." S. Rep. No. 836, at 17.

In relying upon this legislative history of the FECA, I do not mean to suggest that that history is part of the legislative history of the LHWCA. As the Court notes, *ante*, at 275, the legislative history of the LHWCA is silent concerning the reasons why Congress included a schedule. Although Congress' intent in this matter cannot be discerned with absolute certainty, it is plausible that its reasons for adopting a schedule for the FECA were the same as its reasons for having one for the LHWCA.

pensate respondent Cross for the wages he has lost and will lose because of his injury.

Although the Court states that the "weight of judicial authority" supports its view, it is able to cite only a single Federal District Court decision in point,[6] namely, *Williams* v. *Donovan*, 234 F. Supp. 135 (ED La. 1964), aff'd, 367 F. 2d 825 (CA5 1966), cert. denied, 386 U. S. 977 (1967).[7] This contrasts with the consistently held view of the Benefits Review Board,[8] the agency established to administer the LHWCA. *Sokolowski* v. *Bank of America*, 261 N. Y. 57, 184 N. E. 492 (1933), of course, provides scant support for today's decision. That case was decided after the LHWCA was enacted, and is an uncertain guide, at best, to the intent of the Congress that passed the Act six years earlier.

Thus, the anomalous results the Court's decision imposes upon respondent Cross and other claimants under the LHWCA[9] are not mandated, in my view, by the statute. It

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[6] The other federal cases cited by the Court are clearly distinguishable. In *Flamm* v. *Hughes*, 329 F. 2d 378 (CA2 1964), the court rejected a claim that it was unconstitutional for Congress to provide a schedule for some injuries, but not for others. The plaintiff, however, was dissatisfied with the award obtained under § 908 (c) (21), and hoped to obtain a larger award from a schedule. The court did not address the question whether the schedule provides an exclusive remedy for a claimant who can prove a wage loss greater than that specified by the schedule. The Court acknowledges that *Travelers Ins. Co.* v. *Cardillo*, 225 F. 2d 137 (CA2), cert. denied, 350 U. S. 913 (1955), which held that proof of lost wages is irrelevant when an employee seeks to recover under the schedule, did not decide the question before us. *Ante*, at 277, n. 15.

[7] The one paragraph *per curiam* affirming the District Court's decision in *Williams* does not discuss the exclusivity issue.

[8] See n. 1, *supra*.

[9] The inadequate compensation awarded to respondent Cross is only one of a number of peculiarities resulting from today's decision. Under the rule announced by the Court, a person who suffers a temporary partial disability may receive more compensation than one who suffers a like but permanent partial disability, even though the latter injury is obviously more serious and will cause a greater loss of earnings. In this case, if

is possible to construe the statute to allow a claimant seeking compensation for permanent partial disability to choose between the schedule and the provisions of § 908 (c)(21). I think we should follow *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U. S. 408 (1932), and adopt a liberal construction of the statute so as to avoid the amazingly incongruous result approved by the Court.

I would affirm the judgment of the Court of Appeals.

Cross' injury were a temporary partial disability, he would be entitled to receive two-thirds of his lost earning capacity for a maximum of five years. § 908 (e). Thus, he could receive a total of about $22,400 ($86 per week for five years), an amount almost twice as large as the maximum compensation that the Court now allows him for his *permanent* partial disability. "It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the Act." *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U. S. 408, 413 (1932).

Today's decision also creates a significant *disincentive* for the seriously injured workers who otherwise might wish to return to work. The courts and the Benefits Review Board have held that a worker who is unable to do any work as the result of a scheduled injury may be compensated for permanent total disability, and the Court does not question this rule. See *ante*, at 277–278, n. 17. A worker who has been permanently and totally disabled receives two-thirds of his average weekly wages. § 908 (a). A worker who takes a low-paying job because a scheduled injury makes him unable to work at his old job will be considered permanently partially disabled. His compensation will be limited to the scheduled amount, even though that amount may be insufficient to make up the difference between his former earnings and his earnings at the new job. Such a worker will learn quickly that it is to his advantage not to attempt to do any work. See *Mason* v. *Old Dominion Stevedoring Corp.*, 1 BRBS, at 365; *Brandt* v. *Avondale Shipyards, Inc.*, 8 BRBS, at 701–702.

UNITED STATES *v.* DARUSMONT ET UX.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 80-243. Decided January 12, 1981

Held: The 1976 amendments of the minimum tax provisions of §§ 56 and 57 of the Internal Revenue Code of 1954—increasing the rate of the minimum tax and decreasing the allowable exemption as to enumerated items of tax preference, including the deduction for 50% of any net long-term capital gain, and making the amendments effective for the taxable years beginning after December 31, 1975—may be applied to appellee taxpayers' sale of a house, resulting in a long-term capital gain, that took place in 1976 prior to the enactment of the amendments, without violating the Due Process Clause of the Fifth Amendment. The retroactive application of an income tax statute to the entire calendar year in which enactment takes place does not *per se* violate that Clause. Nor is the retroactive imposition of the minimum tax amendments so harsh and oppressive here as to deny due process, even though appellees would not have owed any minimum tax under the prior provisions. Assuming, *arguendo*, that personal notice of tax changes is relevant, appellees cannot claim surprise, since the proposed increase in the minimum tax rate had been under public discussion for almost a year before its enactment. And the amendments to the minimum tax did not create a "new tax," since the minimum tax provision was imposed in 1969, and one of the original items of tax preference subjected to the minimum tax was the untaxed portion of any net long-term capital gain.

80-2 USTC ¶ 9671, p. 85,208, 47 AFTR 2d ¶ 81-366, p. 81-519, reversed and remanded.

PER CURIAM.

Appellees instituted this federal income tax refund suit, claiming that the 1976 amendments of the minimum tax provisions contained in §§ 56 and 57 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 56 and 57, could not be applied to a transaction that had taken place in 1976, prior to the enactment of the amendments, without violating the Due Process Clause of the Fifth Amendment.

Appellees prevailed in the District Court. The United States has taken an appeal to this Court pursuant to 28 U. S. C. § 1252, which authorizes a direct appeal from the final judgment of a court of the United States holding an Act of Congress unconstitutional in any civil action to which the United States is a party. And a direct appeal may be taken when, as here, a federal statute has been held unconstitutional as applied to a particular circumstance. *Fleming* v. *Rhodes*, 331 U. S. 100 (1947). See *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U. S. 561, 563 (1972).

I

The appellees, E. M. Darusmont and B. L. Darusmont, are husband and wife. Mrs. Darusmont is a party to this action solely because she and her husband filed a joint federal income tax return for the calendar year 1976. We hereinafter sometimes refer to the appellees in the singular, either as "appellee" or as "taxpayer."

In April 1976, Mr. Darusmont was notified by his employer that he was to be transferred from Houston, Tex., to Bakersfield, Cal. Appellee, accordingly, undertook to dispose of his Houston home. That home was a triplex. One of the three units was occupied by the Darusmonts; taxpayer rented the other two. Appellee retained a real estate firm to list the property and to give him advice as to the most advantageous way to sell it. The firm suggested various alternatives (sale as separate condominium units, or as a whole, and either for cash or on the installment basis). The firm and appellee discussed the income tax consequences of each alternative, including the tax on capital gain, the installment method of reporting, and the possibility of deferring a portion of any capital gain by the timely purchase of a replacement home in California.

After considering the several possible methods of structuring the sale, and after computing the projected income tax consequences of each method, appellee decided on an outright

sale. That sale was effected on July 15, 1976, for cash. This resulted in a long-term capital gain to the taxpayer. Because, however, appellee purchased a replacement residence in California, he was able, under § 1034 of the Code, 26 U. S. C. § 1034, to defer recognition of that portion of the gain attributable to the unit of the Texas house that the Darusmonts had occupied. Appellee's recognized gain on the sale of the other two units was $51,332. After taking into account the deduction of 50% of net capital gain then permitted by § 1202 of the Code, 26 U. S. C. § 1202, appellee included the remainder of the gain in his reported taxable income. The Darusmonts timely filed their joint federal income tax return for the calendar year 1976. That return showed a tax of $25,384, which was paid.

The present controversy concerns $2,280, the portion of appellee's 1976 income tax liability attributable to the minimum tax imposed by § 56 of the Code on items of tax preference as defined in § 57. These minimum tax provisions, which impose a tax in addition to the regular income tax, first appeared with the enactment of the Tax Reform Act of 1969, Pub. L. 91–172, § 301, 83 Stat. 580. Originally, the minimum tax equaled 10% of the amount by which the aggregate of enumerated items of tax preference exceeded the sum of a $30,000 exemption plus the taxpayer's regular income tax liability. For an individual, one of the items of tax preference was the deduction under § 1202 for net capital gain. See § 57 (a)(9)(A). Thus, appellee's § 1202 deduction for 1976 for 50% of the capital gain recognized on the sale of the two units of the Texas triplex was an item of tax preference. If the statute's original formulation, with its base of $30,000 plus the regular income tax liability, had been retained in the statute for 1976, appellee would not have owed any minimum tax as a result of the sale of the Houston house.

On October 4, 1976, however, the President signed the Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1520. Section 301 of that Act, 90 Stat. 1549, amended § 56 (a) of the Code

so as to increase the rate of the minimum tax and to reduce the amount of the exemption to $10,000 or one-half of the taxpayer's regular income tax liability (with certain adjustments), whichever was the greater. Section 301 (g)(1), 90 Stat. 1553, with exceptions not pertinent here, then provided that "the amendments made by this section shall apply to items of tax preference for taxable years beginning after December 31, 1975." It is this stated effective date that creates the issue now in controversy for, in a certain sense, the October 4, 1976, amendment of § 56 operated "retroactively" to cover the portion of 1976 prior to that date. A result of the statutory change of October 4 was that appellee was subjected to the now contested minimum tax of $2,280 on the sale of the Texas house the preceding July 15.

A proper claim for refund of the minimum tax so paid was duly filed with the Internal Revenue Service. Upon the denial of that claim, the Darusmonts instituted this refund suit in the United States District Court for the Eastern District of California. Taxpayer argued that the 1976 amendments could not be applied constitutionally to a transaction fully consummated prior to their enactment. He further argued that had he known that the sale of the house would have resulted in liability for the minimum tax, he could have structured the sale so as to avoid the tax. He has conceded, however, that when he was considering the various ways in which he could dispose of the Texas property, he was not aware of the existence of the minimum tax.

The District Court entered judgment in favor of appellee. It held that the application of the 1976 amendments to a transaction consummated in 1976 prior to October 4 subjected appellee "to a new, separate and distinct tax," and was "so arbitrary and oppressive as to be a denial of due process" guaranteed by the Fifth Amendment. App. to Juris. Statement 3a; 80–2 USTC ¶ 9671, p. 85,208, 47 AFTR 2d ¶ 81–366, p. 81–519. We note that the District Court's ruling is in conflict with the later decision of the United States Court of Ap-

peals for the Eighth Circuit in *Buttke* v. *Commissioner*, 625 F. 2d 202 (1980), aff'g 72 T. C. 677 (1979).[1]

II

In enacting general revenue statutes, Congress almost without exception has given each such statute an effective date prior to the date of actual enactment. This was true with respect to the income tax provisions of the Tariff Act of Oct. 3, 1913, and the successive Revenue Acts of 1916 through 1938.[2] It was also true with respect to the Internal Revenue Codes of 1939 and 1954.[3] Usually the "retroactive" feature has application only to that portion of the current calendar year preceding the date of enactment, but each of the Revenue Acts of 1918 and 1926 was applicable to an entire calendar year that had expired preceding enactment. This "retroactive" application apparently has been confined

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[1] The Tax Court consistently has adhered to this position. See *Estate of Kearns* v. *Commissioner*, 73 T. C. 1223 (1980); *Westwick* v. *Commissioner*, 38 TCM 1269, ¶ 79,329 P-H Memo TC (1979) (appeal pending CA10); *Estate of Lewis* v. *Commissioner*, 40 TCM 78, ¶ 80,106 P-H Memo TC (1980) (appeal pending CA5); *Schopp* v. *Commissioner*, 40 TCM 275, ¶ 80,148 P-H Memo TC (1980); *Witte* v. *Commissioner*, 40 TCM 1259, ¶ 80,393 P-H Memo TC (1980).

Other rulings adverse to the taxpayer on this issue are *Appendrodt* v. *United States*, 490 F. Supp. 490 (WD Pa. 1980); *Metzger* v. *United States*, No. 78-0346-S (SD Cal. Feb. 16, 1979) (appeal pending CA9).

[2] Tariff Act of Oct. 3, 1913, § II, D, 38 Stat. 168; Revenue Act of 1916, §§ 8 (a) and (b), 13 (a) and (b), 39 Stat. 761, 770, 771; War Revenue Act of 1917, §§ 1, 2, 4, 40 Stat. 300–302; Revenue Act of 1918, § 200, 40 Stat. 1058; Revenue Act of 1921, § 200 (1), 42 Stat. 227; Revenue Act of 1924, § 200 (a), 43 Stat. 254; Revenue Act of 1926, § 200 (a), 44 Stat. (part 2) 10; Revenue Act of 1928, §§ 1, 48 (a), 45 Stat. 795, 807; Revenue Act of 1932, §§ 1, 48 (a), 47 Stat. 173, 187; Revenue Act of 1934, § 1, 48 Stat. 683; Revenue Act of 1935, 49 Stat. 1014; Revenue Act of 1936, § 1, 49 Stat. 1652; Revenue Act of 1937, 50 Stat. 813; Revenue Act of 1938, § 1, 52 Stat. 452.

[3] Internal Revenue Code of 1939, § 1, 53 Stat. 4; Internal Revenue Code of 1954, § 7851 (a)(1)(A), 68A Stat. 919.

to short and limited periods required by the practicalities of producing national legislation. We may safely say that it is a customary congressional practice.

The Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not *per se* violate the Due Process Clause of the Fifth Amendment. See *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331, 332 (1874); *id.,* at 341 (dissenting opinion); *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 20 (1916); *Cooper* v. *United States,* 280 U. S. 409, 411 (1930); *Milliken* v. *United States,* 283 U. S. 15, 21 (1931); *Reinecke* v. *Smith,* 289 U. S. 172, 175 (1933); *United States* v. *Hudson,* 299 U. S. 498, 500–501 (1937); *Welch* v. *Henry,* 305 U. S. 134, 146, 148–150 (1938); *Fernandez* v. *Wiener,* 326 U. S. 340, 355 (1945). See also Ballard, Retroactive Federal Taxation, 48 Harv. L. Rev. 592 (1935); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 706–711 (1960).

Justice Miller succinctly stated the principle a century ago in writing for the Court in *Stockdale, supra:*

> "The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed." 20 Wall., at 331.

Justice Van Devanter in writing for the Court in *Hudson, supra,* similarly approved the congressional practice:

> "As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this

> Court have recognized this practice and sustained it as consistent with the due process clause of the Constitution." 299 U. S., at 500.

The Court has stated the underlying rationale for allowing this "retroactivity":

> "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute." *Welch* v. *Henry,* 305 U. S., at 146–147.

Judge Learned Hand also commented upon the point and set forth the answer to the constitutional argument:

> "Nobody has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress at least for periods of less than twelve months; Congress has done so from the outset. . . . The injustice is no greater than if a man chance to make a profitable sale in the months before the general rates are retroactively changed. Such a one may indeed complain that, could he have foreseen the increase, he would have kept the transaction unliquidated, but it will not avail him; he must be prepared for such possibilities, the system being already in operation. His is a different case from that of one who, when he takes action, has no reason to suppose that any transactions of the sort will be taxed at all." *Cohan* v. *Commissioner,* 39 F. 2d 540, 545 (CA2 1930).

Appellee concedes that the Court "has held that a retroactive income tax statute does not violate the 'due process'

clause of the Constitution *per se*." Motion to Affirm 6. Appellee asserts, however, that three tests have been developed for determining whether a particular tax is so harsh and oppressive as to be a denial of due process, namely, whether the taxpayer could have altered his behavior to avoid the tax if it could have been anticipated by him at the time the transaction was effected; whether the taxpayer had notice of the tax when he engaged in the transaction; and whether the tax is a new tax and not merely an increase in the rate of an existing income tax. Appellee argues that the altered minimum tax fits within these three tests.

In support of the first proposition, appellee cites *Blodgett* v. *Holden* 275 U. S. 142 (1927), modified, 276 U. S. 594 (1928), and *Untermyer* v. *Anderson*, 276 U. S. 440 (1928). These, however, are gift tax cases, and the gifts in question were made and completely vested before the enactment of the taxing statute. We do not regard them as controlling authority with respect to any retroactive feature of a federal income tax. See *Welch* v. *Henry*, 305 U. S., at 147–148.

Regarding his second test, appellee states that he had no notice, either actual or constructive, of the forthcoming October changes in the minimum tax when he sold the triplex in July and that, as a consequence, the retroactive imposition of the tax after the sale was arbitrary, harsh, and oppressive. Assuming, for purposes of argument, that personal notice is relevant, appellee is hardly in a position to claim surprise at the 1976 amendments to the minimum tax. The proposed increase in rate had been under public discussion for almost a year before its enactment. See H. R. Rep. No. 94–658, pp. 130–132 (1975); S. Rep. No. 94–938, pp. 108–114 (1976). The Tax Reform Act of 1976 reflected a compromise between the House and Senate proposals. Both bills, however, provided that the changes in the minimum tax were to be effective for taxable years beginning after 1975. Appellee, therefore, had ample advance notice of the increase in the effective minimum rate.

Appellee's "new tax" argument is answered completely by the fact that the 1976 amendments to the minimum tax did not create a new tax. To be sure, the minimum tax is described in the statute, § 56 (a), as one "[i]n addition to" the regular income tax. But the minimum tax provision was imposed in 1969, and one of the original items of tax preference subjected to the minimum tax was the untaxed portion of any net long-term capital gain. 83 Stat. 582.

Appellee's position is far different from that of the individual who, as Judge Hand stated in the language quoted above, "has no reason to suppose that any transactions of the sort will be taxed at all." The 1976 changes affected appellee only by decreasing the allowable exemption and increasing the percentage rate of tax. "Congress intended these changes to raise the effective tax rate on tax preference items . . . ." Staff of the Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess., 105 (Comm. Print 1976). Congress possessed ample authority to make this kind of change effective as of the beginning of the year of enactment. We are not persuaded by appellee's proffered distinction between his case and *Buttke* v. *Commissioner*, 625 F. 2d 202 (CA8 1980), that the taxpayer in *Buttke*, unlike appellee, would have incurred a tax anyway under the prior form of the statute. See *Estate of Lewis* v. *Commissioner*, 40 TCM 78, ¶ 80,106 P–H Memo TC (1980) (appeal pending CA5).

We think *Cooper* v. *United States*, 280 U. S. 409 (1930), is particularly close to this case. There the taxpayer, on November 7, 1921, sold stock acquired by gift from her husband a week earlier. On November 23, however, the Revenue Act of 1921 was approved and became law. The new Act provided that the income tax basis of property received by gift after December 31, 1920, was the same as the donor's basis, instead of being the fair market value of the property at the time of the gift, the rule which had theretofore prevailed.

The taxpayer sought to avoid the lower carryover basis in computing her gain on the sale, and argued that the new provision should not be applied "to transactions fully completed before enactment of the statute." *Id.*, at 411. This Court, however, rejected that contention, saying, *ibid.*:

> "That the questioned provision can not be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income has not been open to serious doubt since *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, and *Lynch* v. *Hornby*, 247 U. S. 339."

The judgment of the United States District Court for the Eastern District of California is therefore reversed, and the case is remanded to that court with directions to enter judgment for the United States.

It is so ordered.

ALLSTATE INSURANCE CO. *v.* HAGUE, PERSONAL REPRESENTATIVE OF HAGUE'S ESTATE

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 79-938. Argued October 6, 1980—Decided January 13, 1981

Respondent's husband died of injuries suffered when a motorcycle on which he was a passenger was struck by an automobile. The accident occurred in Wisconsin near the Minnesota border. The operators of both vehicles were Wisconsin residents, as was the decedent, who, however, had been employed in Minnesota and had commuted daily to work from Wisconsin. Neither vehicle operator carried valid insurance, but the decedent held a policy issued by petitioner covering three automobiles owned by him and containing an uninsured motorist clause insuring him against loss incurred from accidents with uninsured motorists, but limiting such coverage to $15,000 for each automobile. After the accident, respondent moved to and became a resident of Minnesota, and was subsequently appointed in that State as personal representative of her husband's estate. She then brought an action in a Minnesota court seeking a declaration under Minnesota law that the $15,000 uninsured motorist coverage on each of her late husband's three automobiles could be "stacked" to provide total coverage of $45,000. Petitioner defended on the ground that whether the three uninsured motorist coverages could be stacked should be determined by Wisconsin law, since the insurance policy was delivered in Wisconsin, the accident occurred there, and all persons involved were Wisconsin residents at the time of the accident. The trial court, interpreting Wisconsin law to disallow stacking, concluded that Minnesota's choice-of-law rules required the application of Minnesota law permitting stacking, and granted summary judgment for respondent. The Minnesota Supreme Court affirmed.

Held: The judgment is affirmed. Pp. 307–320; 322–331.

289 N. W. 2d 43, affirmed.

JUSTICE BRENNAN, joined by JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded that Minnesota has a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law is neither arbitrary nor fundamentally unfair, and, accordingly, the choice of law by the Minnesota Supreme Court does not violate the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause. Pp. 307–320.

(a) Respondent's decedent was a member of Minnesota's work force. The State of employment has police power responsibilities towards nonresident employees that are analogous to those it has towards residents, as such employees use state services and amenities and may call upon state facilities in appropriate circumstances. Also, the State's interest in its commuting nonresident employees, such as respondent's decedent, reflects a state concern for the safety and well-being of its work force and the concomitant effect on Minnesota employers. That the decedent was not killed while commuting to work or while in Minnesota does not dictate a different result, since vindication of the rights of the estate of a Minnesota employee is an important state concern. Nor does the decedent's residence in Wisconsin constitutionally mandate application of Wisconsin law to the exclusion of forum law. Employment status is not a sufficiently less important status than residence, when combined with the decedent's daily commute across state lines and the other Minnesota contacts present, to prohibit the choice-of-law result in this case on constitutional grounds. Pp. 313–317.

(b) Petitioner was at all times present and doing business in Minnesota. By virtue of such presence, petitioner can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved. Moreover, such presence gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court-appointed representative (respondent) and a longstanding member of Minnesota's work force (respondent's decedent). Pp. 317–318.

(c) Respondent became a Minnesota resident prior to institution of the instant litigation. Such residence and subsequent appointment in Minnesota as personal representative of her late husband's estate constitute a Minnesota contact which gives Minnesota an interest in respondent's recovery. Pp. 318–319.

JUSTICE STEVENS concluded:

1. The Full Faith and Credit Clause did not require Minnesota, the forum State, to apply Wisconsin law to the contract-interpretation question presented. Although the Minnesota courts' decision to apply Minnesota law was unsound as a matter of conflicts law, no threat to Wisconsin's sovereignty ensued from allowing the substantive question as to the meaning of the insurance contract to be determined by the law of another State. Pp. 322–326.

2. The Due Process Clause of the Fourteenth Amendment did not prevent Minnesota from applying its own law. Neither the "stacking" rule itself nor Minnesota's application of it to these litigants raised any

serious question of fairness. Nor did the Minnesota courts' decision to apply this rule violate due process because that decision frustrated the contracting parties' reasonable expectations. The decision was consistent with due process because it did not result in unfairness to either litigant, not because Minnesota had an interest in the plaintiff as resident or the decedent as employee. Pp. 326–331.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 320. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 332. STEWART, J., took no part in the consideration or decision of the case.

Mark M. Nolan argued the cause and filed a brief for petitioner.

Andreas F. Lowenfeld argued the cause for respondent. With him on the brief were *Samuel H. Hertogs* and *Bruce J. Douglas.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN joined.

This Court granted certiorari to determine whether the Due Process Clause of the Fourteenth Amendment [1] or the Full Faith and Credit Clause of Art. IV, § 1,[2] of the United States Constitution bars the Minnesota Supreme Court's choice of substantive Minnesota law to govern the effect of a provision in an insurance policy issued to respondent's decedent. 444 U. S. 1070 (1980).

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[1] The Due Process Clause of the Fourteenth Amendment provides that no State "shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[2] The Full Faith and Credit Clause, Art. IV, § 1, provides:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

I

Respondent's late husband, Ralph Hague, died of injuries suffered when a motorcycle on which he was a passenger was struck from behind by an automobile. The accident occurred in Pierce County, Wis., which is immediately across the Minnesota border from Red Wing, Minn. The operators of both vehicles were Wisconsin residents, as was the decedent, who, at the time of the accident, resided with respondent in Hager City, Wis., which is one and one-half miles from Red Wing. Mr. Hague had been employed in Red Wing for the 15 years immediately preceding his death and had commuted daily from Wisconsin to his place of employment.

Neither the operator of the motorcycle nor the operator of the automobile carried valid insurance. However, the decedent held a policy issued by petitioner Allstate Insurance Co. covering three automobiles owned by him and containing an uninsured motorist clause insuring him against loss incurred from accidents with uninsured motorists. The uninsured motorist coverage was limited to $15,000 for each automobile.[3]

After the accident, but prior to the initiation of this lawsuit, respondent moved to Red Wing. Subsequently, she married a Minnesota resident and established residence with her new husband in Savage, Minn. At approximately the same time, a Minnesota Registrar of Probate appointed respondent personal representative of her deceased husband's estate. Following her appointment, she brought this action in Minnesota District Court seeking a declaration under Minnesota law that the $15,000 uninsured motorist coverage on each of her late husband's three automobiles could be "stacked" to provide total coverage of $45,000. Petitioner defended on the ground that whether the three uninsured motorist

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[3] Ralph Hague paid a separate premium for each automobile including an additional separate premium for each uninsured motorist coverage.

coverages could be stacked should be determined by Wisconsin law, since the insurance policy was delivered in Wisconsin, the accident occurred in Wisconsin, and all persons involved were Wisconsin residents at the time of the accident.

The Minnesota District Court disagreed. Interpreting Wisconsin law to disallow stacking, the court concluded that Minnesota's choice-of-law rules required the application of Minnesota law permitting stacking. The court refused to apply Wisconsin law as "inimical to the public policy of Minnesota" and granted summary judgment for respondent.[4]

The Minnesota Supreme Court, sitting en banc, affirmed the District Court.[5] The court, also interpreting Wisconsin law to prohibit stacking,[6] applied Minnesota law after analyzing the relevant Minnesota contacts and interests within the analytical framework developed by Professor Leflar.[7] See Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N. Y. U. L. Rev. 267 (1966). The state court, therefore, examined the conflict-of-laws issue in terms of (1) predictability of result, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. Although stating that the Minnesota contacts might not be, "in themselves, sufficient to mandate application of [Minnesota] law,"[8] 289 N. W. 2d 43, 49

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[4] App. C to Pet. for Cert. A-29.

[5] 289 N. W. 2d 43 (1978).

[6] Respondent has suggested that this case presents a "false conflict." The court below rejected this contention and applied Minnesota law. Even though the Minnesota Supreme Court's choice of Minnesota law followed a discussion of whether this case presents a false conflict, the fact is that the court chose to apply Minnesota law. Thus, the only question before this Court is whether that choice was constitutional.

[7] Minnesota had previously adopted the conceptual model developed by Professor Leflar in *Milkovich* v. *Saari*, 295 Minn. 155, 203 N. W. 2d 408 (1973).

[8] The court apparently was referring to sufficiency as a matter of choice

(1978), under the first four factors, the court concluded that the fifth factor—application of the better rule of law—favored selection of Minnesota law. The court emphasized that a majority of States allow stacking and that legal decisions allowing stacking "are fairly recent and well considered in light of current uses of automobiles." *Ibid.* In addition, the court found the Minnesota rule superior to Wisconsin's "because it requires the cost of accidents with uninsured motorists to be spread more broadly through insurance premiums than does the Wisconsin rule." *Ibid.* Finally, after rehearing en banc,[9] the court buttressed its initial opinion by indicating "that contracts of insurance on motor vehicles are in a class by themselves" since an insurance company "knows the automobile is a movable item which will be driven from state to state." 289 N. W. 2d, at 50 (1979). From this premise the court concluded that application of Minnesota law was "not so arbitrary and unreasonable as to violate due process." *Ibid.*

II

It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations. Implicit in this inquiry is the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction. See, *e. g.*, *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66, 72–73 (1954); n. 11, *infra*. See generally *Clay* v. *Sun Insurance Office, Ltd.*, 377 U. S.

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of law and not as a matter of constitutional limitation on its choice-of-law decision.

[9] 289 N. W. 2d, at 50 (1979).

179, 181–182 (1964) (hereinafter cited as *Clay II*). As a result, the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy.

In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause,[10] this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. See *Clay II*, *supra*, at 183. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, see *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 542 (1935), the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.[11]

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[10] This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause. In each instance, the Court has examined the relevant contacts and resulting interests of the State whose law was applied. See, *e. g.*, *Nevada* v. *Hall*, 440 U. S. 410, 424 (1979). Although at one time the Court required a more exacting standard under the Full Faith and Credit Clause than under the Due Process Clause for evaluating the constitutionality of choice-of-law decisions, see *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 549–550 (1935) (interest of State whose law was applied was no less than interest of State whose law was rejected), the Court has since abandoned the weighing-of-interests requirement. *Carroll* v. *Lanza*, 349 U. S. 408 (1955); see *Nevada* v. *Hall*, *supra*; Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449 (1959). Different considerations are of course at issue when full faith and credit is to be accorded to acts, records, and proceedings outside the choice-of-law area, such as in the case of sister state-court judgments.

[11] Prior to the advent of interest analysis in the state courts as the "dominant mode of analysis in modern choice of law theory," Silberman, *Shaffer* v. *Heitner*: The End of an Era, 53 N. Y. U. L. Rev. 33, 80, n. 259 (1978); cf. *Richards* v. *United States*, 369 U. S. 1, 11–13, and nn. 26–27 (1962) (discussing trend toward interest analysis in state courts), the prevailing choice-of-law methodology focused on the jurisdiction where a par-

Two instructive examples of such invalidation are *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930), and *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936). In both cases, the selection of forum law rested exclusively on the presence of one nonsignificant forum contact.

Home Ins. Co. v. *Dick* involved interpretation of an insurance policy which had been issued in Mexico, by a Mexican insurer, to a Mexican citizen, covering a Mexican risk. The policy was subsequently assigned to Mr. Dick, who was domiciled in Mexico and "physically present and acting in Mexico," 281 U. S., at 408, although he remained a nominal, permanent resident of Texas. The policy restricted coverage to losses occurring in certain Mexican waters and, indeed, the loss occurred in those waters. Dick brought suit

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ticular event occurred. See, *e. g.*, Restatement of Conflict of Laws (1934). For example, in cases characterized as contract cases, the law of the place of contracting controlled the determination of such issues as capacity, fraud, consideration, duty, performance, and the like. *Id.*, § 332; see Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 260, 270–271 (1910). In the tort context, the law of the place of the wrong usually governed traditional choice-of-law analysis. Restatement, *supra*, § 378; see *Richards* v. *United States*, *supra*, at 11–12.

Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), can, perhaps, best be explained as an example of that period. In that case, the Court struck down application by the Mississippi courts of Mississippi law which voided the limitations provision in a fidelity bond written in Tennessee between a Connecticut insurer and Delta, both of which were doing business in Tennessee and Mississippi. By its terms, the bond covered misapplication of funds "by any employee 'in any position, anywhere . . . .'" *Id.*, at 145. After Delta discovered defalcations by one of its Mississippi-based employees, a lawsuit was commenced in Mississippi.

That case, however, has scant relevance for today. It implied a choice-of-law analysis which, for all intents and purposes, gave an isolated event—the writing of the bond in Tennessee—controlling constitutional significance, even though there might have been contacts with another State (there Mississippi) which would make application of its law neither unfair nor unexpected. See Martin, Personal Jurisdiction and Choice of Law, 78 Mich. L. Rev. 872, 874, and n. 11 (1980).

in Texas against a New York reinsurer. Neither the Mexican insurer nor the New York reinsurer had any connection to Texas.[12] The Court held that application of Texas law to void the insurance contract's limitation-of-actions clause violated due process.[13]

The relationship of the forum State to the parties and the transaction was similarly attenuated in *John Hancock Mutual Life Ins. Co.* v. *Yates*. There, the insurer, a Massachusetts corporation, issued a contract of insurance on the life of a New York resident. The contract was applied for, issued, and delivered in New York where the insured and his spouse resided. After the insured died in New York, his spouse moved to Georgia and brought suit on the policy in Georgia. Under Georgia law, the jury was permitted to take into account oral modifications when deciding whether an insurance policy application contained material misrepresentations. Under New York law, however, such misrepresentations were to be evaluated solely on the basis of the written application. The Georgia court applied Georgia law. This Court reversed, finding application of Georgia law to be unconstitutional.

Dick and *Yates* stand for the proposition that if a State has only an insignificant contact with the parties and the

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[12] Dick sought to obtain *quasi-in-rem* jurisdiction by garnishing the reinsurance obligation of the New York reinsurer. The reinsurer had never transacted business in Texas, but it "was cited by publication, in accordance with a Texas statute; attorneys were appointed for it by the trial court; and they filed on its behalf an answer which denied liability." 281 U. S., at 402. There would be no jurisdiction in the Texas courts to entertain such a lawsuit today. See *Rush* v. *Savchuk*, 444 U. S. 320 (1980); *Shaffer* v. *Heitner*, 433 U. S. 186 (1977); Silberman, *supra*, at 62–65.

[13] The Court noted that the result might have been different if there had been some connection to Texas upon "which the State could properly lay hold as the basis of the regulations there imposed." 281 U. S., at 408, n. 5; see *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66, 71 (1954).

occurrence or transaction, application of its law is unconstitutional.[14] *Dick* concluded that nominal residence—standing alone—was inadequate; *Yates* held that a postoccurrence change of residence to the forum State—standing alone—was insufficient to justify application of forum law. Although instructive as extreme examples of selection of forum law, neither *Dick* nor *Yates* governs this case. For in contrast to those decisions, here the Minnesota contacts with the parties and the occurrence are obviously significant. Thus, this case is like *Alaska Packers*, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947), and *Clay II*—cases where this Court sustained choice-of-law decisions based on the contacts of the State, whose law was applied, with the parties and occurrence.

In *Alaska Packers*, the Court upheld California's application of its Workmen's Compensation Act, where the most significant contact of the worker with California was his execution of an employment contract in California. The worker, a nonresident alien from Mexico, was hired in California for seasonal work in a salmon canning factory in Alaska. As part of the employment contract, the employer, who was doing business in California, agreed to transport the worker to Alaska and to return him to California when the work was completed. Even though the employee contracted to be bound by the Alaska Workmen's Compensation Law and was injured in Alaska, he sought an award under the California Workmen's Compensation Act. The Court held that the choice of California law was not "so arbitrary or unreasonable as to amount to a denial of due process," 294 U. S., at 542, because "[w]ithout a remedy in California, [he] would be remediless," *ibid.*, and because of California's interest that the worker not become a public charge, *ibid.*[15]

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[14] See generally, Weintraub, *supra* n. 10, at 455–457.

[15] The Court found no violation of the Full Faith and Credit Clause, since California's interest was considered to be no less than Alaska's, 294

In *Cardillo* v. *Liberty Mutual Ins. Co., supra,* a District of Columbia resident, employed by a District of Columbia employer and assigned by the employer for the three years prior to his death to work in Virginia, was killed in an automobile crash in Virginia in the course of his daily commute home from work. The Court found the District's contacts with the parties and the occurrence sufficient to satisfy constitutional requirements, based on the employee's residence in the District, his commute between home and the Virginia workplace, and his status as an employee of a company "engaged in electrical construction work in the District of Columbia and surrounding areas." *Id.,* at 471.[16]

Similarly, *Clay II* upheld the constitutionality of the application of forum law. There, a policy of insurance had issued in Illinois to an Illinois resident. Subsequently the insured moved to Florida and suffered a property loss in Florida. Relying explicitly on the nationwide coverage of the policy and the presence of the insurance company in Florida and implicitly on the plaintiff's Florida residence and the occurrence of the property loss in Florida, the Court sustained the Florida court's choice of Florida law.

The lesson from *Dick* and *Yates,* which found insufficient forum contacts to apply forum law, and from *Alaska Packers, Cardillo,* and *Clay II,* which found adequate contacts to sustain the choice of forum law,[17] is that for a State's substan-

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U. S., at 547–548, 549–550, even though the injury occurred in Alaska while the employee was performing his contract obligations there. While *Alaska Packers* balanced the interests of California and Alaska to determine the full faith and credit issue, such balancing is no longer required. See *Nevada* v. *Hall,* 440 U. S., at 424; n. 10, *supra.*

[16] The precise question raised was whether the Virginia Compensation Commission "had sole jurisdiction over the claim." 330 U. S., at 472–473. In finding that application of the District's law did not violate either due process or full faith and credit requirements, the Court in effect treated the question as a constitutional choice-of-law issue.

[17] The Court has upheld choice-of-law decisions challenged on constitutional grounds in numerous other decisions. See *Nevada* v. *Hall, supra*

tive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. Application of this principle to the facts of this case persuades us that the Minnesota Supreme Court's choice of its own law did not offend the Federal Constitution.

III

Minnesota has three contacts with the parties and the occurrence giving rise to the litigation. In the aggregate, these contacts permit selection by the Minnesota Supreme Court of Minnesota law allowing the stacking of Mr. Hague's uninsured motorist coverages.

First, and for our purposes a very important contact, Mr. Hague was a member of Minnesota's work force, having been employed by a Red Wing, Minn., enterprise for the 15

(upholding California's application of California law to automobile accident in California between two California residents and a Nevada official driving car owned by State of Nevada while engaged in official business in California); *Carroll* v. *Lanza*, 349 U. S. 408 (1955) (upholding Arkansas' choice of Arkansas law where Missouri employee executed employment contract with Missouri employer and was injured on job in Arkansas but was removed immediately to a Missouri hospital); *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954) (allowing application of Louisiana direct action statute by Louisiana resident against insurer even though policy was written and delivered in another State, where plaintiff was injured in Louisiana); *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493 (1939) (holding Full Faith and Credit Clause not violated where California applied own Workmen's Compensation Act in case of injury suffered by Massachusetts employee temporarily in California in course of employment). Thus, *Nevada* v. *Hall*, *supra*, and *Watson* v. *Employers Liability Assurance Corp.*, *supra*, upheld application of forum law where the relevant contacts consisted of plaintiff's residence and the place of the injury. *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, *supra*, and *Carroll* v. *Lanza*, *supra*, relied on the place of the injury arising from the respective employee's temporary presence in the forum State in connection with his employment.

years preceding his death. While employment status may implicate a state interest less substantial than does resident status, that interest is nevertheless important. The State of employment has police power responsibilities towards the nonresident employee that are analogous, if somewhat less profound, than towards residents. Thus, such employees use state services and amenities and may call upon state facilities in appropriate circumstances.

In addition, Mr. Hague commuted to work in Minnesota, a contact which was important in *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S., at 475–476 (daily commute between residence in District of Columbia and workplace in Virginia), and was presumably covered by his uninsured motorist coverage during the commute.[18] The State's interest in its commuting nonresident employees reflects a state concern for the safety and well-being of its work force and the concomitant effect on Minnesota employers.

That Mr. Hague was not killed while commuting to work or while in Minnesota does not dictate a different result. To hold that the Minnesota Supreme Court's choice of Minnesota law violated the Constitution for that reason would require too narrow a view of Minnesota's relationship with the parties and the occurrence giving rise to the litigation. An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected to the occurrence.[19]

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[18] The policy issued to Mr. Hague provided that Allstate would pay to the insured, or his legal representative, damages "sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of [an] uninsured automobile. . . ." No suggestion has been made that Mr. Hague's uninsured motorist protection is unavailable because he was not killed while driving one of his insured automobiles.

[19] Numerous cases have applied the law of a jurisdiction other than the situs of the injury where there existed some other link between that jurisdiction and the occurrence. See, *e. g.*, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947); *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532 (1935); *Rosenthal* v. *Warren*, 475 F. 2d 438 (CA2), cert. denied, 414 U. S. 856 (1973); *Clark* v. *Clark*, 107 N. H. 351, 222 A. 2d 205

Similarly, the occurrence of a crash fatal to a Minnesota employee in another State is a Minnesota contact.[20] If Mr. Hague had only been injured and missed work for a few weeks, the effect on the Minnesota employer would have been palpable and Minnesota's interest in having its employee made whole would be evident. Mr. Hague's death affects Minnesota's interest still more acutely, even though Mr. Hague will not return to the Minnesota work force. Minnesota's work force is surely affected by the level of protection the State extends to it, either directly or indirectly. Vindication of the rights of the estate of a Minnesota employee, therefore, is an important state concern.

Mr. Hague's residence in Wisconsin does not—as Allstate seems to argue—constitutionally mandate application of Wisconsin law to the exclusion of forum law.[21] If, in the in-

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(1966); *Tooker* v. *Lopez*, 24 N. Y. 2d 569, 249 N. E. 2d 394 (1969); *Babcock* v. *Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279 (1963).

[20] The injury or death of a resident of State A in State B is a contact of State A with the occurrence in State B. See cases cited in n. 19, *supra*.

[21] Petitioner's statement that the instant dispute involves the interpretation of insurance contracts which were "underwritten, applied for, and paid for by Wisconsin residents and issued covering cars garaged in Wisconsin," Brief for Petitioner 6, is simply another way of stating that Mr. Hague was a Wisconsin resident. Respondent could have replied that the insurance contract was underwritten, applied for and paid for by a Minnesota worker, and issued covering cars that were driven to work in Minnesota and garaged there for a substantial portion of the day. The former statement is hardly more significant than the latter since the accident in any event did not involve any of the automobiles which were covered under Mr. Hague's policy. Recovery is sought pursuant to the uninsured motorist coverage.

In addition, petitioner's statement that the contracts were "underwritten . . . by Wisconsin residents" is not supported by the stipulated facts if petitioner means to include itself within that phrase. Indeed, the policy, which is part of the record, recites that Allstate signed the policy in Northbrook, Ill. Under some versions of the hoary rule of *lex loci contractus*, and depending on the precise sequence of events, a sequence which is unclear from the record before us, the law of Illinois arguably might apply to govern contract construction, even though Illinois

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stant case, the accident had occurred in Minnesota between Mr. Hague and an uninsured Minnesota motorist, if the insurance contract had been executed in Minnesota covering a Minnesota registered company automobile which Mr. Hague was permitted to drive, and if a Wisconsin court sought to apply Wisconsin law, certainly Mr. Hague's residence in Wisconsin, his commute between Wisconsin and Minnesota, and the insurer's presence in Wisconsin should be adequate to apply Wisconsin's law.[22] See generally *Cardillo* v. *Liberty*

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would have less contact with the parties and the occurrence than either Wisconsin or Minnesota. No party sought application of Illinois law on that basis in the court below.

[22] Of course Allstate could not be certain that Wisconsin law would necessarily govern any accident which occurred in Wisconsin, whether brought in the Wisconsin courts or elsewhere. Such an expectation would give controlling significance to the wooden *lex loci delicti* doctrine. While the place of the accident is a factor to be considered in choice-of-law analysis, to apply blindly the traditional, but now largely abandoned, doctrine, Silberman, *supra* n. 11, at 80, n. 259; see n. 11, *supra*, would fail to distinguish between the relative importance of various legal issues involved in a lawsuit as well as the relationship of other jurisdictions to the parties and the occurrence or transaction. If, for example, Mr. Hague had been a Wisconsin resident and employee who was injured in Wisconsin and was then taken by ambulance to a hospital in Red Wing, Minn., where he languished for several weeks before dying, Minnesota's interest in ensuring that its medical creditors were paid would be obvious. Moreover, under such circumstances, the accident itself might be reasonably characterized as a bistate occurrence beginning in Wisconsin and ending in Minnesota. Thus, reliance by the insurer that Wisconsin law would necessarily govern any accident that occurred in Wisconsin, or that the law of another jurisdiction would necessarily govern any accident that did not occur in Wisconsin, would be unwarranted. See n. 11, *supra;* cf. *Rosenthal* v. *Warren*, *supra* (Massachusetts hospital could not have purchased insurance with expectation that Massachusetts law would govern damages recovery as to New York patient who died in hospital and whose widow brought suit in New York).

If the law of a jurisdiction other than Wisconsin did govern, there was a substantial likelihood, with respect to uninsured motorist coverage, that stacking would be allowed. Stacking was the rule in most States at the time the policy was issued. Indeed, the Wisconsin Supreme Court, in

Mutual Ins. Co., supra; Alaska Packers Assn. v. *Industrial Accident Comm'n*, 294 U. S. 532 (1935); *Home Ins. Co.* v. *Dick*, 281 U. S., at 408, n. 5. Employment status is not a sufficiently less important status than residence, see generally *Carroll* v. *Lanza*, 349 U. S. 408 (1955); *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra*, when combined with Mr. Hague's daily commute across state lines and the other Minnesota contacts present, to prohibit the choice-of-law result in this case on constitutional grounds.

Second, Allstate was at all times present and doing business in Minnesota.[23] By virtue of its presence, Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to liti-

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Nelson v. *Employers Mutual Casualty Co.*, 63 Wis. 2d 558, 563–566, and nn. 2, 3, 217 N. W. 2d 670, 672, 674, and nn. 2, 3 (1974), identified 29 States, including Minnesota, whose law it interpreted to allow stacking, and only 9 States whose law it interpreted to prohibit stacking. Clearly then, Allstate could not have expected that an antistacking rule would govern any particular accident in which the insured might be involved and thus cannot claim unfair surprise from the Minnesota Supreme Court's choice of forum law.

[23] The Court has recognized that examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes. See *Kulko* v. *California Superior Court*, 436 U. S. 84, 98 (1978) (no jurisdiction in California but California law "arguably might" apply); *Shaffer* v. *Heitner*, 433 U. S., at 215 (no jurisdiction in Delaware, although Delaware interest "may support the application of Delaware law"); cf. *Hanson* v. *Denckla*, 357 U. S. 235, 254, and n. 27 (1958) (no jurisdiction in Florida; the "issue is personal jurisdiction, not choice of law," an issue which the Court found no need to decide). Nevertheless, "both inquiries 'are often closely related and to a substantial degree depend upon similar considerations.'" *Shaffer*, 433 U. S., at 224–225 (BRENNAN, J., concurring in part and dissenting in part). Here, of course, jurisdiction in the Minnesota courts is unquestioned, a factor not without significance in assessing the constitutionality of Minnesota's choice of its own substantive law. Cf. *id.*, at 225 ("the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy").

gation in which the company is involved. "Particularly since the company was licensed to do business in [the forum], it must have known it might be sued there, and that [the forum] courts would feel bound by [forum] law."[24] *Clay* v. *Sun Insurance Office Ltd.*, 363 U. S. 207, 221 (1960) (Black, J., dissenting).[25] Moreover, Allstate's presence in Minnesota gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court-appointed representative—respondent—and a longstanding member of Minnesota's work force—Mr. Hague. See *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 316 (1943).

Third, respondent became a Minnesota resident prior to institution of this litigation. The stipulated facts reveal that she first settled in Red Wing, Minn., the town in which

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[24] There is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law. Because Allstate was doing business in Minnesota and was undoubtedly aware that Mr. Hague was a Minnesota employee, it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved. See *Clay II*, 377 U. S. 179, 182 (1964); *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S., at 72–73; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S., at 538–543; cf. *Home Ins. Co.* v. *Dick*, 281 U. S., at 404 (neither insurer nor reinsurer present in forum State). Indeed, Allstate specifically anticipated that Mr. Hague might suffer an accident either in Minnesota or elsewhere in the United States, outside of Wisconsin, since the policy it issued offered continental coverage. Cf. *id.*, at 403 (coverage limited to losses occurring in certain Mexican waters which were outside of jurisdiction whose law was applied). At the same time, Allstate did not seek to control construction of the contract since the policy contained no choice-of-law clause dictating application of Wisconsin law. See *Clay II*, *supra*, at 182 (nationwide coverage of policy and lack of choice-of-law clause).

[25] Justice Black's dissent in the first *Clay* decision, a decision which vacated and remanded a lower-court determination to obtain an authoritative construction of state law that might moot the constitutional question, subsequently commanded majority support in the second *Clay* decision. *Clay II*, *supra*, at 180–183.

her late husband had worked.[26] She subsequently moved to Savage, Minn., after marrying a Minnesota resident who operated an automobile service station in Bloomington, Minn. Her move to Savage occurred "almost concurrently," 289 N. W. 2d, at 45, with the initiation of the instant case.[27] There is no suggestion that Mrs. Hague moved to Minnesota in anticipation of this litigation or for the purpose of finding a legal climate especially hospitable to her claim.[28] The stipulated facts, sparse as they are, negate any such inference.

While *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936), held that a postoccurrence change of residence to the forum State was insufficient in and of itself to confer power on the forum State to choose its law, that case did not hold that such a change of residence was irrelevant. Here, of course, respondent's bona fide residence in Minnesota was not the sole contact Minnesota had with this litigation. And in connection with her residence in Minnesota, respondent was appointed personal representative of Mr. Hague's estate by the Registrar of Probate for the County of Goodhue, Minn. Respondent's residence and subsequent appointment in Minnesota as personal representative of her late husband's estate constitute a Minnesota contact which gives Minnesota an interest in respondent's recovery, an interest which the court below identified as full compensation for "resident accident victims" to keep them "off welfare rolls" and able "to meet financial obligations." 289 N. W. 2d, at 49.

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[26] The stipulated facts do not reveal the date on which Mrs. Hague first moved to Red Wing.

[27] These proceedings began on May 28, 1976. Mrs. Hague was remarried on June 19, 1976.

[28] The dissent suggests that considering respondent's postoccurrence change of residence as one of the Minnesota contacts will encourage forum shopping. *Post*, at 337. This overlooks the fact that her change of residence was bona fide and not motivated by litigation considerations.

In sum, Minnesota had a significant aggregation [29] of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair. Accordingly, the choice of Minnesota law by the Minnesota Supreme Court did not violate the Due Process Clause or the Full Faith and Credit Clause.

Affirmed.

JUSTICE STEWART took no part in the consideration or decision of this case.

JUSTICE STEVENS, concurring in the judgment.

As I view this unusual case—in which neither precedent nor constitutional language provides sure guidance—two separate questions must be answered. First, does the Full Faith and Credit Clause [1] *require* Minnesota, the forum State, to apply Wisconsin law? Second, does the Due Process Clause [2] of the Fourteenth Amendment *prevent* Minnesota from applying its own law? The first inquiry implicates the federal interest in ensuring that Minnesota respect the sovereignty of the State of Wisconsin; the second implicates the litigants' interest in a fair adjudication of their rights.[3]

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[29] We express no view whether the first two contacts, either together or separately, would have sufficed to sustain the choice of Minnesota law made by the Minnesota Supreme Court.

[1] Article IV, § 1, provides:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

[2] Section 1 of the Fourteenth Amendment provides, in part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[3] The two questions presented by the choice-of-law issue arise only after it is assumed or established that the defendant's contacts with the forum State are sufficient to support personal jurisdiction. Although the choice-of-law concerns—respect for another sovereign and fairness to the liti-

I realize that both this Court's analysis of choice-of-law questions [4] and scholarly criticism of those decisions [5] have treated these two inquiries as though they were indistinguish-

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gants—are similar to the two functions performed by the jurisdictional inquiry, they are not identical. In *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 291–292 (1980), we stated:

"The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."

See also Reese, Legislative Jurisdiction, 78 Colum. L. Rev. 1587, 1589–1590 (1978). While it has been suggested that this same minimum-contacts analysis be used to define the constitutional limitations on choice of law, see, *e. g.*, Martin, Personal Jurisdiction and Choice of Law, 78 Mich. L. Rev. 872 (1980), the Court has made it clear over the years that the personal jurisdiction and choice-of-law inquiries are not the same. See *Kulko* v. *California Superior Court*, 436 U. S. 84, 98 (1978); *Shaffer* v. *Heitner*, 433 U. S. 186, 215 (1977); *id.*, at 224–226 (BRENNAN, J., dissenting in part); *Hanson* v. *Denckla*, 357 U. S. 235, 253–254 (1958); *id.*, at 258 (Black, J., dissenting).

[4] Although the Court has struck down a state court's choice of forum law on both due process, see, *e. g.*, *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930), and full faith and credit grounds, see, *e. g.*, *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936), no clear analytical distinction between the two constitutional provisions has emerged. The Full Faith and Credit Clause, of course, was inapplicable in *Home Ins. Co.* because the law of a foreign nation, rather than of a sister State, was at issue; a similarly clear explanation for the Court's reliance upon the Full Faith and Credit Clause in *John Hancock Mutual Life Ins.* cannot be found. Indeed, *John Hancock Mutual Life Ins.* is probably best understood as a due process case. See Reese, *supra*, at 1589, and n. 17; Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449, 457–458 (1959).

[5] See R. Leflar, American Conflicts Law § 5, p. 7, § 55, pp. 106–107 (3d ed. 1977). The Court's frequent failure to distinguish between the two Clauses in the choice-of-law context may underlie the suggestions of various commentators that either the Full Faith and Credit Clause or the Due Process Clause be recognized as the single appropriate source for

able.[6] Nevertheless, I am persuaded that the two constitutional provisions protect different interests and that proper analysis requires separate consideration of each.

I

The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation. See *Thomas* v. *Washington Gas Light Co.*, 448 U. S. 261, 271–272 (1980) (plurality opinion); *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 276–277 (1935).[7] The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. The Clause does not, however, rigidly

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constitutional limitations on choice of law. Compare Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185 (1976) (full faith and credit), with Reese, *supra* (due process); see also Kirgis, The Roles of Due Process and Full Faith and Credit in Choice of Law, 62 Cornell L. Rev. 94 (1976).

[6] Even when the Court has explicitly considered both provisions in a single case, the requirements of the Due Process and Full Faith and Credit Clauses have been measured by essentially the same standard. For example, in *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), the Court separately considered the due process and full faith and credit questions. See *id.*, at 70–73. However, in concluding that the Full Faith and Credit Clause did not bar the Louisiana courts from applying Louisiana law in that case, the Court substantially relied upon its preceding analysis of the requirements of due process. *Id.*, at 73. By way of contrast, in *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 544–550 (1935), the Court's full faith and credit analysis differed significantly from its due process analysis. However, as noted in the plurality opinion, *ante*, at 308, n. 10, the Court has since abandoned the full faith and credit standard represented by *Alaska Packers*.

[7] See also Sumner, The Full-Faith-and-Credit-Clause—Its History and Purpose, 34 Or. L. Rev. 224, 242 (1955); Weintraub, *supra*, at 477; R. Leflar, *supra*, § 73, p. 143.

require the forum State to apply foreign law whenever another State has a valid interest in the litigation. See *Nevada* v. *Hall*, 440 U. S. 410, 424 (1979); *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 546–548 (1935); *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, 501–502 (1939).[8] On the contrary, in view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.[9] Accordingly, the fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause. Rather, in my opinion, the Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.[10]

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[8] As the Court observed in *Alaska Packers*, *supra*, an overly rigid application of the Full Faith and Credit Clause would produce anomalous results:

"A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." 294 U. S., at 547.

[9] For example, it is well established that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada* v. *Hall*, 440 U. S. 410, 422 (1979) (footnote omitted).

[10] The kind of state action the Full Faith and Credit Clause was designed to prevent has been described in a variety of ways by this Court. In *Carroll* v. *Lanza*, 349 U. S. 408, 413 (1955), the Court indicated that the Clause would be invoked to restrain "any policy of hostility to the public Acts" of another State. In *Nevada* v. *Hall*, *supra*, at 424, n. 24, we approved action which "pose[d] no substantial threat to our constitutional system of cooperative federalism." And in *Thomas* v. *Washington Gas Light Co.*, 448 U. S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

In this case, I think the Minnesota courts' decision to apply Minnesota law was plainly unsound as a matter of normal conflicts law. Both the execution of the insurance contract and the accident giving rise to the litigation took place in Wisconsin. Moreover, when both of those events occurred, the plaintiff, the decedent, and the operators of both vehicles were all residents of Wisconsin. Nevertheless, I do not believe that any threat to national unity or Wisconsin's sovereignty ensues from allowing the substantive question presented by this case to be determined by the law of another State.

The question on the merits is one of interpreting the meaning of the insurance contract. Neither the contract itself, nor anything else in the record, reflects any express understanding of the parties with respect to what law would be applied or with respect to whether the separate uninsured motorist coverage for each of the decedent's three cars could be "stacked." Since the policy provided coverage for accidents that might occur in other States, it was obvious to the parties at the time of contracting that it might give rise to the application of the law of States other than Wisconsin. Therefore, while Wisconsin may have an interest in ensuring that contracts formed in Wisconsin in reliance upon Wisconsin law are interpreted in accordance with that law, that interest is not implicated in this case.[11]

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[11] While the justifiable expectations of the litigants are a major concern for purposes of due process scrutiny of choice-of-law decisions, see Part II, *infra*, the decision in *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936), suggests that this concern may also implicate state interests cognizable under the Full Faith and Credit Clause. In *John Hancock Mutual Life Ins.*, the Court struck down on full faith and credit grounds a Georgia court's choice of Georgia law over a conflicting New York statute in a suit on a New York life insurance contract brought after the insured's death in New York. Central to the decision in that case was the Court's apparent concern that application of Georgia law would result in unfair surprise to one of the contracting parties. The Court found that

Petitioner has failed to establish that Minnesota's refusal to apply Wisconsin law poses any direct [12] or indirect threat to Wisconsin's sovereignty.[13] In the absence of any such

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the New York statute was "a rule of substantive law which became a term of the contract, as much so as the amount of the premium to be paid or the time for its payment." *Id.*, at 182 (footnote omitted). This statute "determine[d] the substantive rights of the parties as fully as if a provision to that effect had been embodied in writing in the policy." *Id.*, at 182–183. The insurer had no reason to expect that the New York statute would not control all claims arising under the life insurance policy. The parties to a life insurance contract normally would not expect the place of death to have any bearing upon the proper construction of the policy; by way of contrast, in the case of a liability policy, the place of the tort might well be relevant. For that reason, in a life insurance contract relationship, it is likely that neither party would expect the law of any State other than the place of contracting to have any relevance in possible subsequent litigation. See generally C. Carnahan, Conflict of Laws and Life Insurance Contracts § 15, pp. 51–52, § 47, pp. 264–265, 267–268, § 60, pp. 325–327 (2d ed. 1958).

Paul Freund has aptly characterized *John Hancock Mutual Life Ins.* as perhaps this Court's "most ambitious application of the full faith and credit clause." Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1233 (1946). Like *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145 (1932), on which the Court relied, see 299 U. S., at 183, *John Hancock Mutual Life Ins.* was one of a series of constitutional decisions in the 1930's that have been limited by subsequent cases. See *Carroll* v. *Lanza*, 349 U. S., at 412; *Thomas* v. *Washington Gas Light Co.*, *supra*, at 272–273, n. 18 (plurality opinion). See also Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 675 (1959).

[12] Compare *Nevada* v. *Hall*, *supra*, in which the Court permitted a California court to disregard Nevada's statutory limitation on damages available against the State. The Court found this direct intrusion upon Nevada's sovereignty justified because the Nevada statute was "obnoxious" to California's public policy. *Id.*, at 424.

[13] It is clear that a litigant challenging the forum's application of its own law to a lawsuit properly brought in its courts bears the burden of establishing that this choice of law infringes upon interests protected by the Full Faith and Credit Clause. See *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S., at 547–548.

It is equally clear that a state court's decision to apply its own law cannot violate the Full Faith and Credit Clause where the application of

threat, I find it unnecessary to evaluate the forum State's interest in the litigation in order to reach the conclusion that the Full Faith and Credit Clause does not require the Minnesota courts to apply Wisconsin law to the question of contract interpretation presented in this case.

II

It may be assumed that a choice-of-law decision would violate the Due Process Clause if it were totally arbitrary or if it were fundamentally unfair to either litigant. I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State.[14] The forum State's interest in the fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction.

The forum State's interest in the efficient operation of its judicial system is clearly not sufficient, however, to justify the application of a rule of law that is fundamentally unfair to one of the litigants. Arguably, a litigant could demonstrate such unfairness in a variety of ways. Concern about the fairness of the forum's choice of its own rule might arise

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forum law does not impinge at all upon the interests of other States. Cf. Reese, *supra* n. 3, at 1601.

[14] This task can be particularly difficult for a trial judge who does not have ready access to a law library containing the statutes and decisions of all 50 States. If that judge is able to apply law with which he is thoroughly familiar or can easily discover, substantial savings can accrue to the State's judicial system. Moreover, an erroneous interpretation of the governing rule is less likely when the judge is applying a familiar rule. Cf. *Shaffer* v. *Heitner*, 433 U. S., at 225–226 (BRENNAN, J., dissenting in part) (such concerns indicate that a State's ability to apply its own law to a transaction should be relevant for purposes of evaluating its power to exercise jurisdiction over the parties to that transaction).

if that rule favored residents over nonresidents, if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied.[15]

The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law. A choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.[16]

Neither the "stacking" rule itself, nor Minnesota's application of that rule to these litigants, raises any serious question of fairness. As the plurality observes, "[s]tacking was

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[15] Discrimination against nonresidents would be constitutionally suspect even if the Due Process Clause were not a check upon a State's choice-of-law decisions. See Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U. Chi. L. Rev. 1 (1960); Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L. J. 1323 (1960); Note, Unconstitutional Discrimination in Choice of Law, 77 Colum. L. Rev. 272 (1977). Moreover, both discriminatory and substantively unfair rules of law may be detected and remedied without any special choice-of-law analysis; familiar constitutional principles are available to deal with both varieties of unfairness. See, *e. g.*, Martin, *supra* n. 5, at 199.

[16] Upon careful analysis, most of the decisions of this Court that struck down on due process grounds a state court's choice of forum law can be explained as attempts to prevent a State with a minimal contact with the litigation from materially enlarging the contractual obligations of one of the parties where that party had no reason to anticipate the possibility of such enlargement. See, *e. g.*, *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934); cf. *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936) (similar concern under Full Faith and Credit Clause, see n. 11, *supra*). See generally Weintraub, *supra* n. 4, at 457–460.

the rule in most States at the time the policy was issued." *Ante*, at 316, n. 22.[17] Moreover, the rule is consistent with the economics of a contractual relationship in which the policyholder paid three separate premiums for insurance coverage for three automobiles, including a separate premium for each uninsured motorist coverage.[18] Nor am I persuaded that the decision of the Minnesota courts to apply the "stacking" rule in this case can be said to violate due process because that decision frustrates the reasonable expectations of the contracting parties.

Contracting parties can, of course, make their expectations explicit by providing in their contract either that the law of a particular jurisdiction shall govern questions of contract interpretation,[19] or that a particular substantive rule, for instance "stacking," shall or shall not apply.[20] In the absence

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[17] See also *Nelson* v. *Employers Mutual Casualty Co.*, 63 Wis. 2d 558, 563–566, and nn. 2, 3, 217 N. W. 2d 670, 672–674, and nn. 2, 3 (1974), discussed *ante*, at 316–317, n. 22.

[18] The "stacking" rule provides that all of the uninsured motorist coverage purchased by an insured party may be aggregated, or "stacked," to create a fund available to provide a recovery for a single accident.

[19] For example, in *Home Ins. Co.* v. *Dick*, *supra*, at 403, and n. 1, the insurance policy was subject, by its express terms, to Mexican law.

[20] *Home Ins. Co.*, *supra*, again provides a useful example. In that case, the insurance policy expressly provided a 1-year limitations period for claims arising thereunder. *Id.*, at 403. Similarly, the insurance policy at issue in *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, *supra*, at 146, also prescribed a specific limitations period.

While such express provisions are obviously relevant, they are not always dispositive. In *Clay* v. *Sun Insurance Office, Ltd.*, 377 U. S. 179 (1964), the Court allowed the lower court's choice of forum law to override an express contractual limitations period. The Court emphasized the fact that the insurer had issued the insurance policy with the knowledge that it would cover the insured property wherever it was taken. *Id.*, at 181–182. The Court also noted that the insurer had not attempted to provide in the policy that the law of another State would control. *Id.*, at 182.

In *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S., at 68, the insurance policy expressly provided that an injured party could not main-

of such express provisions, the contract nonetheless may implicitly reveal the expectations of the parties. For example, if a liability insurance policy issued by a resident of a particular State provides coverage only with respect to accidents within that State, it is reasonable to infer that the contracting parties expected that their obligations under the policy would be governed by that State's law.[21]

In this case, no express indication of the parties' expectations is available. The insurance policy provided coverage for accidents throughout the United States; thus, at the time of contracting, the parties certainly could have anticipated that the law of States other than Wisconsin would govern particular claims arising under the policy.[22] By virtue of doing busi-

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tain a direct action against the insurer until after the insured's liability had been determined. The Court found that neither the Due Process Clause nor the Full Faith and Credit Clause prevented the Louisiana courts from applying forum law to permit a direct action against the insurer prior to determination of the insured's liability. As in *Clay*, the Court noted that the policy provided coverage for injuries anywhere in the United States. 348 U. S., at 71–72. An additional, although unarticulated, factor in *Watson* was the fact that the litigant urging that forum law be applied was not a party to the insurance contract. While contracting parties may be able to provide in advance that a particular rule of law will govern disputes between them, their expectations are clearly entitled to less weight when the rights of third-party litigants are at issue.

[21] In *Home Ins. Co., supra*, the insurance policy was issued in Mexico by a Mexican corporation and covered the insured vessel only in certain Mexican waters. *Id.*, at 403.

[22] In *Clay* v. *Sun Insurance Office, Ltd., supra*, at 182, and *Watson* v. *Employers Liability Assurance Corp., supra*, at 71–72, the Court considered it significant, in upholding the lower courts' choice of forum law, that the insurance policies provided coverage throughout the United States. See n. 20, *supra*. Of course, in both *Clay* and *Watson* the loss to which the insurance applied actually occurred in the forum State, whereas the accident in this case occurred in Wisconsin, not Minnesota. However, as the dissent recognizes, *post*, at 336–337, because the question on the merits is one of contract interpretation rather than tort liability, the actual site of the accident is not dispositive with respect to the due process inquiry. More relevant is the fact that the parties, at the time of con-

ness in Minnesota, Allstate was aware that it could be sued in the Minnesota courts; Allstate also presumably was aware that Minnesota law, as well as the law of most States, permitted "stacking." Nothing in the record requires that a different inference be drawn. Therefore, the decision of the Minnesota courts to apply the law of the forum in this case does not frustrate the reasonable expectations of the contracting parties, and I can find no fundamental unfairness in that decision requiring the attention of this Court.[23]

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tracting, anticipated that an accident covered by the policy could occur in a "stacking" State. The fact that this particular accident did not occur in Minnesota does not undercut the expectations formed by the parties at the time of contracting.

In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, *supra*, the Court struck down a state court's choice of forum law despite the fact that the insurance contract's coverage was not limited by state boundaries. While *Hartford Accident* may indeed have "scant relevance for today," *ante*, at 309, n. 11, it is nonetheless consistent with a due process analysis based upon fundamental fairness to the parties. One of the statutes applied by the Mississippi courts in *Hartford Accident* was offensively broad, providing that "[a]ll contracts of insurance on property, lives or interests in this state shall be deemed to be made therein." 292 U. S., at 148. No similar statute is involved in this case. In addition, the Mississippi courts applied the law of the forum to override an express contractual provision, and thus frustrated the expectations of the contracting parties. In the present case, the insurance contract contains no similar declaration of the intent of the parties.

[23] Comparison of this case with *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930), confirms my conclusion that the application of Minnesota law in this case does not offend the Due Process Clause. In *Home Ins. Co.*, the contract expressly provided that a particular limitations period would govern claims arising under the insurance contract and that Mexican law was to be applied in interpreting the contract; in addition, the contract was limited in effect to certain Mexican waters. The parties could hardly have made their expectations with respect to the applicable law more plain. In this case, by way of contrast, nothing in the contract suggests that Wisconsin law should be applied or that Minnesota's "stacking" rule should not be applied. In this case, unlike *Home Ins. Co.*, the court's choice of forum law results in no unfair surprise to the insurer.

In terms of fundamental fairness, it seems to me that two factors relied upon by the plurality—the plaintiff's post-accident move to Minnesota and the decedent's Minnesota employment—are either irrelevant to or possibly even tend to undermine the plurality's conclusion. When the expectations of the parties at the time of contracting are the central due process concern, as they are in this case, an unanticipated postaccident occurrence is clearly irrelevant for due process purposes. The fact that the plaintiff became a resident of the forum State after the accident surely cannot justify a ruling in her favor that would not be made if the plaintiff were a nonresident. Similarly, while the fact that the decedent regularly drove into Minnesota might be relevant to the expectations of the contracting parties,[24] the fact that he did so because he was employed in Minnesota adds nothing to the due process analysis. The choice-of-law decision of the Minnesota courts is consistent with due process because it does not result in unfairness to either litigant, not because Minnesota now has an interest in the plaintiff as resident or formerly had an interest in the decedent as employee.

III

Although I regard the Minnesota courts' decision to apply forum law as unsound as a matter of conflicts law, and there

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[24] Even this factor may not be of substantial significance. At the time of contracting, the parties were aware that the insurance policy was effective throughout the United States and that the law of any State, including Minnesota, might be applicable to particular claims. The fact that the decedent regularly drove to Minnesota, for whatever purpose, is relevant only to the extent that it affected the parties' evaluation, at the time of contracting, of the likelihood that Minnesota law would actually be applied at some point in the future. However, because the applicability of Minnesota law was perceived as possible at the time of contracting, it does not seem especially significant for due process purposes that the parties may also have considered it likely that Minnesota law would be applied. This factor merely reinforces the expectation revealed by the policy's national coverage.

is little in this record other than the presumption in favor of the forum's own law to support that decision, I concur in the plurality's judgment. It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule, nor is it our function to ensure that state courts correctly apply whatever choice-of-law rules they have themselves adopted.[25] Our authority may be exercised in the choice-of-law area only to prevent a violation of the Full Faith and Credit or the Due Process Clause. For the reasons stated above, I find no such violation in this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

My disagreement with the plurality is narrow. I accept with few reservations Part II of the plurality opinion, which sets forth the basic principles that guide us in reviewing state choice-of-law decisions under the Constitution. The Court should invalidate a forum State's decision to apply its own law only when there are no significant contacts between the State and the litigation. This modest check on state power is mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Art. IV, § 1. I do not believe, however, that the plurality adequately analyzes the policies such review must serve. In consequence, it has found significant what appear to me to be trivial contacts between the forum State and the litigation.

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[25] In *Kryger* v. *Wilson*, 242 U. S. 171, 176 (1916), after rejecting a due process challenge to a state court's choice of law, the Court stated:

"The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned."

I

At least since *Carroll* v. *Lanza*, 349 U. S. 408 (1955), the Court has recognized that both the Due Process and the Full Faith and Credit Clauses are satisfied if the forum has such significant contacts with the litigation that it has a legitimate state interest in applying its own law. The significance of asserted contacts must be evaluated in light of the constitutional policies that oversight by this Court should serve. Two enduring policies emerge from our cases.

First, the contacts between the forum State and the litigation should not be so "slight and casual" that it would be fundamentally unfair to a litigant for the forum to apply its own State's law. *Clay* v. *Sun Ins. Office, Ltd.*, 377 U. S. 179, 182 (1964). The touchstone here is the reasonable expectation of the parties. See Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449, 445–457 (1959) (Weintraub). Thus, in *Clay*, the insurer sold a policy to Clay " 'with knowledge that he could take his property anywhere in the world he saw fit without losing the protection of his insurance.' " 377 U. S., at 182, quoting *Clay* v. *Sun Ins. Office Ltd.*, 363 U. S. 207, 221 (1960) (Black, J., dissenting). When the insured moved to Florida with the knowledge of the insurer, and a loss occurred in that State, this Court found no unfairness in Florida's applying its own rule of decision to permit recovery on the policy. The insurer "must have known it might be sued there." *Ibid.* See also *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954).[1]

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[1] *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930), is a case where the reasonable expectations of a litigant were frustrated. The insurance contract confined the risk to Mexico, where the loss occurred and where both the insurer and the insured resided until the claim accrued. This Court found a violation of the Due Process Clause when Texas, the forum State, applied a local rule to allow the insured to gain a recovery unavailable under Mexican law. Because of the geographic limitation on the risk, and

Second, the forum State must have a legitimate interest in the outcome of the litigation before it. *Pacific Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493 (1939). The Full Faith and Credit Clause addresses the accommodation of sovereign power among the various States. Under limited circumstances, it requires one State to give effect to the statutory law of another State. *Nevada* v. *Hall*, 440 U. S. 410, 423 (1979). To be sure, a forum State need not give effect to another State's law if that law is in "violation of its own legitimate public policy." *Id.*, at 422. Nonetheless, for a forum State to further its legitimate public policy by applying its own law to a controversy, there must be some connection between the facts giving rise to the litigation and the scope of the State's lawmaking jurisdiction.

Both the Due Process and Full Faith and Credit Clauses ensure that the States do not "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 292 (1980) (addressing Fourteenth Amendment limitation on state-court jurisdiction). As the Court stated in *Pacific Ins. Co., supra:* "[T]he full faith and credit clause does not require one state to substitute for its own statute, *applicable to persons and events within it*, the conflicting statute of another state." *Id.*, at 502 (emphasis added). The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy. In short, examination of contacts addresses whether "the state

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because there were no contacts with the forum State until the claim accrued, the insurer could have had no reasonable expectation that Texas law would be applied to interpret its obligations under the contract. See Weintraub 455.

has an interest in the application of its policy in this instance." Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, in B. Currie, Selected Essays on the Conflict of Laws 188, 189 (1963) (Currie). If it does, the Constitution is satisfied.

John Hancock Mut. Life Ins. Co. v. *Yates*, 299 U. S. 178 (1936), illustrates this principle. A life insurance policy was executed in New York, on a New York insured with a New York beneficiary. The insured died in New York; his beneficiary moved to Georgia and sued to recover on the policy. The insurance company defended on the ground that the insured, in the application for the policy, had made materially false statements that rendered it void under New York law. This Court reversed the Georgia court's application of its contrary rule that all questions of the policy's validity must be determined by the jury. The Court found a violation of the Full Faith and Credit Clause, because "[i]n respect to the accrual of the right asserted under the contract . . . there was no occurrence, nothing done, to which the law of Georgia could apply." *Id.*, at 182. In other words, the Court determined that Georgia had no legitimate interest in applying its own law to the legal issue of liability. Georgia's contacts with the contract of insurance were nonexistent.[2] See *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 408 (1930).

In summary, the significance of the contacts between a forum State and the litigation must be assessed in light of

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[2] "It is manifest that Georgia had no interest in the application to this case of any policy to be found in its laws. When the contract was entered into, and at all times until the insured died, the parties and the transaction were beyond the legitimate reach of whatever policy Georgia may have had. Any interest asserted by Georgia must relate to the circumstance that the action is tried there, and must arise not from any policy directed to the business of life insurance but from some policy having to do with the business of the courts. This was apparently recognized even by the Georgia court; hence the disingenuous characterization of the matter as one of 'procedure' rather than of 'substance.'" Currie 236. See also *id.*, at 232–233.

these two important constitutional policies.[3] A contact, or a pattern of contacts, satisfies the Constitution when it protects the litigants from being unfairly surprised if the forum State applies its own law, and when the application of the forum's law reasonably can be understood to further a legitimate public policy of the forum State.

II

Recognition of the complexity of the constitutional inquiry requires that this Court apply these principles with restraint. Applying these principles to the facts of this case, I do not believe, however, that Minnesota had sufficient contacts with the "persons and events" in this litigation to apply its rule permitting stacking. I would agree that no reasonable expectations of the parties were frustrated. The risk insured by petitioner was not geographically limited. See *Clay* v. *Sun Ins. Office, Ltd.*, 377 U. S., at 182. The close proximity of Hager City, Wis., to Minnesota, and the fact that Hague commuted daily to Red Wing, Minn., for many years should have led the insurer to realize that there was a reasonable probability that the risk would materialize in Minnesota. Under our precedents, it is plain that Minnesota could have applied its own law to an accident occurring within its borders. See *ante*, at 318, n. 24. The fact that the accident did not, in fact, occur in Minnesota is not controlling because the expectations of the litigants *before* the cause of

[3] The plurality today apparently recognizes that the significance of the contacts must be evaluated in light of the policies our review serves. It acknowledges that the sufficiency of the same contacts sometimes will differ in jurisdiction and choice-of-law questions. *Ante*, at 317, n. 23. The plurality, however, pursues the rationale for the requirement of sufficient contacts in choice-of-law cases no further than to observe that the forum's application of its own law must be "neither arbitrary nor fundamentally unfair." *Ante*, at 313. But this general prohibition does not distinguish questions of choice of law from those of jurisdiction, or from much of the jurisprudence of the Fourteenth Amendment.

action accrues provide the pertinent perspective. See Weintraub 455; n. 1, *supra.*

The more doubtful question in this case is whether application of Minnesota's substantive law reasonably furthers a legitimate state interest. The plurality attempts to give substance to the tenuous contacts between Minnesota and this litigation. Upon examination, however, these contacts are either trivial or irrelevant to the furthering of any public policy of Minnesota.

First, the postaccident residence of the plaintiff-beneficiary is constitutionally irrelevant to the choice-of-law question. *John Hancock Mut. Life Ins. Co.* v. *Yates, supra.* The plurality today insists that *Yates* only held that a postoccurrence move to the forum State could not "in and of itself" confer power on the forum to apply its own law, but did not establish that such a change of residence was irrelevant. *Ante,* at 319. What the *Yates* Court held, however, was that "there was no occurrence, *nothing* done, to which the law of Georgia could apply." 299 U. S., at 182 (emphasis added). Any possible ambiguity in the Court's view of the significance of a postoccurrence change of residence is dispelled by *Home Ins. Co.* v. *Dick, supra,* cited by the *Yates* Court, where it was held squarely that Dick's postaccident move to the forum State was "without significance." 281 U. S., at 408.

This rule is sound. If a plaintiff could choose the substantive rules to be applied to an action by moving to a hospitable forum, the invitation to forum shopping would be irresistible. Moreover, it would permit the defendant's reasonable expectations at the time the cause of action accrues to be frustrated, because it would permit the choice-of-law question to turn on a postaccrual circumstance. Finally, postaccrual residence has nothing to do with facts to which the forum State proposes to apply its rule; it is unrelated to the substantive legal issues presented by the litigation.

Second, the plurality finds it significant that the insurer does business in the forum State. *Ante,* at 317–318. The State

does have a legitimate interest in regulating the practices of such an insurer. But this argument proves too much. The insurer here does business in all 50 States. The forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State.[4] See *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 319 (1943). The plurality recognizes this flaw and attempts to bolster the significance of the local presence of the insurer by combining it with the other factors deemed significant: the presence of the plaintiff and the fact that the deceased worked in the forum State. This merely restates the basic question in the case.

Third, the plurality emphasizes particularly that the insured worked in the forum State.[5] *Ante*, at 313–317. The fact that the insured was a nonresident employee in the forum

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[4] The petitioner in *John Hancock Mut. Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936), did business in Georgia, the forum State, at the time of that case. See The Insurance Almanac 715 (1935). Also, Georgia extensively regulated insurance practices within the State at that time. See Ga. Code § 56–101 *et seq.* (1933). This Court did not hint in *Yates* that this fact was of the slightest significance to the choice-of-law question, although it would have been crucial for the exercise of *in personam* jurisdiction.

[5] The plurality exacts double service from this fact, by finding a separate contact in that the insured commuted daily to his job. *Ante*, at 314–315. This is merely a repetition of the facts that the insured lived in Wisconsin and worked in Minnesota. The State does have an interest in the safety of motorists who use its roads. This interest is not limited to employees, but extends to all nonresident motorists on its highways. This safety interest, however, cannot encompass, either in logic or in any practical sense, the determination whether a nonresident's estate can stack benefit coverage in a policy written in another State regarding an accident that occurred on another State's roads.

Cardillo v. *Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947), hardly establishes commutation as an independent contact; the case merely approved the application of a forum State's law to an industrial accident occurring in a neighboring State when the employer and the employee both resided in the forum State.

State provides a significant contact for the furtherance of some local policies. See, *e. g., Pacific Ins. Co.* v. *Industrial Accident Comm'n,* 306 U. S. 493 (1939) (forum State's interest in compensating workers for employment-related injuries occurring within the State); *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532, 549 (1935) (forum State's interest in compensating the employment-related injuries of a worker hired in the State). The insured's place of employment is not, however, significant in this case. Neither the nature of the insurance policy, the events related to the accident, nor the immediate question of stacking coverage is in any way affected or implicated by the insured's employment status. The plurality's opinion is understandably vague in explaining how trebling the benefits to be paid to the estate of a nonresident employee furthers any substantial state interest relating to employment. Minnesota does not wish its workers to die in automobile accidents, but permitting stacking will not further this interest. The substantive issue here is solely one of compensation, and whether the compensation provided by this policy is increased or not will have no relation to the State's employment policies or police power. See n. 5, *supra.*

Neither taken separately nor in the aggregate do the contacts asserted by the plurality today indicate that Minnesota's application of its substantive rule in this case will further any legitimate state interest.[6] The plurality focuses

[6] The opinion of JUSTICE STEVENS concurring in the judgment supports my view that the forum State's application of its own law to this case cannot be justified by the existence of relevant minimum contacts. As JUSTICE STEVENS observes, the principal factors relied on by the plurality are "either irrelevant to or possibly even tend to undermine the [plurality's] conclusion." *Ante,* at 331. The interesting analysis he proposes to uphold the State's judgment is, however, difficult to reconcile with our prior decisions and may create more problems than it solves. For example, it seems questionable to measure the interest of a State in a controversy by the degree of conscious reliance on that State's law by private

only on physical contacts *vel non*, and in doing so pays scant attention to the more fundamental reasons why our precedents require reasonable policy-related contacts in choice-of-law cases. Therefore, I dissent.

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parties to a contract. *Ante*, at 324. Moreover, scrutinizing the strength of the interests of a nonforum State may draw this Court back into the discredited practice of weighing the relative interests of various States in a particular controversy. See *ante*, at 308, n. 10 (plurality opinion).

Syllabus

WATKINS *v.* SOWDERS, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79–5949. Argued November 10, 1980—Decided January 13, 1981*

Held: A state criminal court is not required by the Due Process Clause of the Fourteenth Amendment to conduct a hearing out of the jury's presence whenever a defendant contends that a witness' identification of him was arrived at improperly. Pp. 345–349.

(a) Where identification evidence is at issue, no such special considerations as exist where the issue of the voluntariness of a confession is presented—an involuntary confession being inadmissible both because it is likely to be unreliable and because of society's aversion to forced confessions, even if true, *Jackson* v. *Denno*, 378 U. S. 368—justify a departure from the presumption that juries will follow the trial court's instructions. It is the reliability of identification evidence that primarily determines its admissibility, and the proper evaluation of evidence under the trial judge's instructions is the very task our system must assume juries can perform. Pp. 346–348.

(b) There is no merit to the contention that vigorous and full cross-examination in the presence of the jury of witnesses as to the possible improprieties of pretrial identifications is inconsistent with due process of law. While a "predicament" is always presented when a lawyer decides on cross-examination to ask a question that may produce an answer unfavorable to his client, the Due Process Clause does not inevitably require the abandonment of the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence. Pp. 348–349.

(c) While a judicial determination outside the jury's presence as to the admissibility of identification evidence may often be advisable and, in some circumstances, not presented in these cases, may be constitutionally necessary, it does not follow that the Constitution requires a *per se* rule compelling such a procedure in every case. P. 349.

608 F. 2d 247, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined.

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*Together with No. 79–5951, *Summitt* v. *Sowders, Warden*, also on certiorari to the same court.

BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 349.

Frank W. Heft, Jr., argued the cause for petitioners in both cases. With him on the briefs was *Daniel T. Goyette*.

Victor Fox, Assistant Attorney General of Kentucky, argued the cause for respondent in both cases. With him on the brief were *Steven L. Beshear*, Attorney General, and *Joseph R. Johnson* and *Penny R. Warren*, Assistant Attorneys General.

JUSTICE STEWART delivered the opinion of the Court.

These cases, consolidated for argument and decision in the Court of Appeals and in this Court, present the question whether a state criminal trial court is constitutionally compelled to conduct a hearing outside the presence of the jury whenever a defendant contends that a witness' identification of him was arrived at improperly.

I

A

John Watkins, the petitioner in No. 79–5949, was convicted in a Kentucky court of attempting to rob a Louisville liquor store. On the night of January 11, 1975, four men entered the store, one of whom asked for a pack of cigarettes. Walter Smith, an employee of the store, turned around to get the cigarettes, and one of the men said "[t]his is a hold-up." Donald Goeing, a part owner of the store, had been stocking a soft-drink cooler, and when he heard those words, he turned towards the robbers. The man who had spoken thereupon fired two shots at him, one striking him in his arm, the other in the region of his heart. The four men then fled.

That night Smith and Goeing described the gunman to the police. Two days later, the police in the presence of Smith conducted a lineup consisting of three men, one of whom was

Watkins. Smith identified Watkins as the gunman. That same day, the police took Watkins to Goeing's hospital bed, and Goeing identified Watkins as the man who had shot him. Watkins was then charged with first-degree robbery and first-degree assault.

At the subsequent trial of Watkins, the prosecution called Smith and Goeing as witnesses. They both identified Watkins as Goeing's assailant but were not asked by the prosecution about the lineup or the showup. Watkins' counsel, however, cross-examined both men at some length about both the lineup and showup. The prosecution then called a police officer. He testified that he had taken Watkins to be identified at the hospital because "at that time there was some question as to whether or not Mr. Goeing was going to survive the incident." Watkins' counsel cross-examined the officer about both the showup and the lineup and through him introduced pictures of the lineup. For the defense, Watkins' counsel called two witnesses who said that they had been in a pool hall with Watkins at the time of the robbery and another witness who said he had been in the liquor store at the time of the robbery and had not seen Watkins. Finally, Watkins himself testified to his innocence.

On appeal, as he had at trial, counsel for Watkins argued that the trial court had a constitutional obligation to conduct a hearing outside the presence of the jury to determine whether the identification evidence was admissible. The Supreme Court of Kentucky rejected that argument. Relying on its decision in *Ray* v. *Commonwealth*, 550 S. W. 2d 482, 483 (1977), the court said " '[a]lthough we are of the opinion that the holding of such a hearing prior to the introduction of this testimony would have been the preferred course to follow, we are not persuaded the failure to have done so requires reversal of appellant's conviction.' " *Watkins* v. *Commonwealth*, 565 S. W. 2d 630, 631 (1978). The court found that the identification procedures "fail[ed] to

raise any impermissible suggestiveness" and that Watkins "was in no way prejudiced." *Ibid.*

Watkins then unsuccessfully sought a writ of habeas corpus in the United States District Court for the Western District of Kentucky. That court held that, "although pretrial suppression hearings are preferable, the failure to hold them does not require the reversal of a conviction."[1] The court also found that admission of neither the lineup nor the showup evidence at the state trial had violated constitutional standards.

The Court of Appeals for the Sixth Circuit affirmed the District Court's judgment and, like the District Court, ruled that a hearing on the admissibility of identification evidence need not be held outside the presence of the jury. Turning to the evidence itself, the court cited *Stovall* v. *Denno*, 388 U. S. 293, as authority for holding that "[g]iven the seriousness of the wounds to Donald Goeing, a showup was necessary in this case." *Summitt* v. *Bordenkircher*, 608 F. 2d 247, 252. The federal appellate court also held that the lineup evidence had been constitutionally admissible at the state trial.

B

James Summitt, the petitioner in No. 79–5951, was convicted in a Kentucky court of rape. Late on the night of July 20, 1974, the prosecutrix was forced into a car occupied by two men, driven to an isolated location, raped by one of the men, and then returned to her own car. The next day she reported the crime to the police, described the rapist, and looked through 12 volumes of photographs from police files, without identifying the man who had raped her. Two days later she was taken to another police station, where she examined more pictures. A police officer testified at the subsequent trial of Summitt that "after a short time she pointed to the defendant's picture and said: 'This is the man that raped me.

[1] The opinion of the District Court is unreported.

There's no doubt about it, this is Jimbo, the man that raped me.'" In addition to the officer, the prosecutrix and her stepfather as witnesses for the prosecution described the prosecutrix's examination of the police photographs, and the prosecutrix testified that Summitt was the man who had raped her. There was extensive cross-examination.

The Supreme Court of Kentucky found "no error in the trial court's refusal to conduct a suppression hearing and no semblance of impermissible suggestiveness in the identification procedure." *Summitt* v. *Commonwealth*, 550 S. W. 2d 548, 550 (1977). Summitt then sought a writ of habeas corpus in the United States District Court for the Western District of Kentucky, but that court found no constitutional error. The Court of Appeals, as in the consolidated *Watkins* case, affirmed the judgment of the District Court, 608 F. 2d 247.

We granted certiorari to consider the constitutional claim asserted by both petitioners throughout their state and federal court proceedings. *Sub nom. Watkins* v. *Bordenkircher* and *Summitt* v. *Bordenkircher*, 445 U. S. 926.

II

The issue before us is not, of course, whether a trial court acts prudently in holding a hearing out of the presence of the jury to determine the admissibility of identification evidence. The prudence of such a hearing has been emphasized by many decisions in the Courts of Appeals, most of which have in various ways admonished trial courts to use that procedure.[2] The

[2] *E. g.*, *United States* v. *Mitchell*, 540 F. 2d 1163 (CA3 1976); *United States* v. *Cranson*, 453 F. 2d 123 (CA4 1971); *Haskins* v. *United States*, 433 F. 2d 836 (CA10 1970); *United States* v. *Ranciglio*, 429 F. 2d 228 (CA8 1970); *United States* v. *Allison*, 414 F. 2d 407 (CA9 1969); *United States* v. *Broadhead*, 413 F. 2d 1351 (CA7 1969); *Clemons* v. *United States*, 133 U. S. App. D. C. 27, 408 F. 2d 1230 (1968) (en banc). The Court of Appeals for the Fifth Circuit has left the matter to the discretion of the district courts. *United States* v. *Smith*, 546 F. 2d 1275 (1977). At least two Federal Courts of Appeals have commended hearings outside

issue here, rather, is whether such a hearing is required by the Due Process Clause of the Fourteenth Amendment.

In urging an affirmative answer, the petitioners first cite cases holding that a defendant has a right to the presence of his counsel at a postindictment lineup, *e. g., United States* v. *Wade*, 388 U. S. 218, and that an identification procedure, in the absence of a lineup, may be so defective as to deprive a defendant of due process of law, *e. g., Stovall* v. *Denno*, 388 U. S. 293. The petitioners then analogize their cases to *Jackson* v. *Denno*, 378 U. S. 368, in which this Court enunciated a defendant's right "to have a fair hearing and a reliable determination on the issue of voluntariness," *id.*, at 377, and in which the Court declared unconstitutional a New York procedure which gave the jury what was in practice unreviewable discretion to decide whether a confession was or was not voluntary.

The petitioners contend that *Jackson* v. *Denno* established a *per se* due process right to a hearing outside the presence of the jury whenever a question of the voluntariness of a confession is raised. If such a hearing is required where the voluntariness of a confession is at issue, it follows, the petitioners argue, that a similar hearing must also be required where the propriety of identification procedures has been questioned.

Even if it be assumed that *Jackson* v. *Denno* did establish the *per se* rule asserted,[3] the petitioners' argument must fail,

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the presence of the jury to state courts, *Nassar* v. *Vinzant*, 519 F. 2d 798 (CA1 1975); *United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912 (CA2 1970), and at least one has held that due process may in some circumstances require a hearing outside the presence of a jury to decide the admissibility of identification evidence. *United States ex rel. Fisher* v. *Driber*, 546 F. 2d 18 (CA3 1976).

[3] See *Pinto* v. *Pierce*, 389 U. S. 31, 32:

"This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. . . . [B]ecause a disputed confession may be found involuntary and inadmissi-

because *Jackson* v. *Denno* is not analogous to the cases now before us. The Court in *Jackson* did reject the usual presumption that a jury can be relied upon to determine issues according to the trial judge's instructions, but the Court did so because of the peculiar problems the issue of the voluntariness of a confession presents. The Court pointed out that, while an involuntary confession is inadmissible in part because such a confession is likely to be unreliable, it is also inadmissible even if it is true, because of the " 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.' " *Id.*, at 385, quoting *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207. The Court concluded in *Jackson* that a jury "may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession . . . . Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the [jury's] implicit findings become suspect." *Id.*, at 382.

Where identification evidence is at issue, however, no such special considerations justify a departure from the presumption that juries will follow instructions. It is the reliability of identification evidence that primarily determines its admissibility, *Manson* v. *Brathwaite*, 432 U. S. 98, 113–114; *United States ex rel. Kirby* v. *Sturges*, 510 F. 2d 397, 402–404 (CA7 1975) (Stevens, J.). And the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed, as the cases before us demonstrate, the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence. Thus the

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ble by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury. . . . In this case, however, the confession was held voluntary and admitted as evidence suitable for consideration by the jury."

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Court's opinion in *Manson* v. *Brathwaite* approvingly quoted Judge Leventhal's statement that,

> "'[w]hile identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the 'integrity'—of the adversary process.
>
> "'Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.'" 432 U. S., at 114, n. 14, quoting *Clemons* v. *United States*, 133 U. S. App. D. C. 27, 48, 408 F. 2d 1230, 1251 (1968) (concurring opinion) (footnote omitted).

The petitioners argue, however, that cross-examination is inadequate in cases such as these. They assert that the presence of the jury deterred their lawyers from cross-examining the witnesses vigorously and fully as to the possible improprieties of the pretrial identifications in these cases. The petitioners point to no specific instances in the trial when their counsel were thus deterred, and the record reveals that the cross-examination on the identity issues was, if not always effective, both active and extended. Nonetheless, the petitioners rely on a passage from *United States* v. *Wade*, *supra*, which referred to

> "'the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification." 388 U. S., at 240–241.

The petitioners, however, attribute undue significance to this passage. The "predicament" described in *Wade* was no

more than part of the Court's demonstration that, if identification stemming from an improperly conducted lineup was to be excluded, a courtroom identification based on such a lineup logically had to be excluded as well.

A "predicament," if one chooses to call it that, is always presented when a lawyer decides on cross-examination to ask a question that may produce an answer unfavorable to his client. Yet, under our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth.[4] We decline in these cases to hold that the Due Process Clause of the Fourteenth Amendment inevitably requires the abandonment of the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence.

A judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable. In some circumstances, not presented here, such a determination may be constitutionally necessary. But it does not follow that the Constitution requires a *per se* rule compelling such a procedure in every case.

Accordingly, the judgments are

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court holds that the Due Process Clause of the Fourteenth Amendment did not require that the trial judge in each of the instant cases hold a "fair hearing," *Jackson* v. *Denno*, 378 U. S. 368, 377 (1964), to decide the admissibility of eyewitness identification evidence, and that a remand is not now required to accord such a hearing. While freely conceding that a "judicial determination outside the presence of the

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[4] As Professor Wigmore put it, "[cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence § 1367 (Chadbourn rev. 1974).

jury of the admissibility of identification evidence may often be advisable [and i]n some circumstances . . . constitutionally necessary," *ante*, at 349, the Court holds that the Constitution does not require "a *per se* rule compelling such a procedure in every case," *ibid.* I dissent. In my view, the Due Process Clause mandates such a hearing whenever a defendant, as both petitioners did at their respective trials below, has proffered some evidence that pretrial police procedures directed at identification were impermissibly suggestive. The flaw in the Court's reasoning lies in its statement that identification evidence does not implicate the "special considerations" on which *Jackson* v. *Denno* relied to "justify a departure from the presumption that juries will follow instructions." *Ante*, at 347. Surely jury instructions can ordinarily no more cure the erroneous admission of powerful identification evidence than they can cure the erroneous admission of a confession. Accordingly, the separate judicial determination of admissibility required by *Jackson* for confessions is equally applicable for eyewitness identification evidence. Because the record before us is inadequate to conclude that in each case the identification evidence was properly admitted, see *Jackson* v. *Denno*, *supra*, at 376–377, I would remand these cases for further proceedings.

At least since *United States* v. *Wade*, 388 U. S. 218 (1967), the Court has recognized the inherently suspect qualities of eyewitness identification evidence.[1] Two particular attributes of such evidence have significance for the instant cases. First, eyewitness identification evidence is notoriously unreliable:

> "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances

[1] The special nature of eyewitness identification evidence has produced an enormous reservoir of scholarly writings, many based on solid empirical research. For a bibliography of that literature, see E. Loftus, Eyewitness Testimony 237–247 (1979).

> of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.' The Case of Sacco and Vanzetti 30 (1927)." *Id.*, at 228 (footnote omitted).

Manson v. *Brathwaite*, 432 U. S. 98, 111–112 (1977), emphasized this troublesome characteristic of such evidence:

> "The driving force behind *United States* v. *Wade*, 388 U. S. 218 (1967), *Gilbert* v. *California*, 388 U. S. 263 (1967) (right to counsel at a post-indictment lineup), and *Stovall*, all decided on the same day, was the Court's concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police."

Accordingly, to guard against the "dangers inherent in eyewitness identification," *United States* v. *Wade*, *supra*, at 235, the Court has required the presence of counsel at postindictment lineups, 388 U. S., at 236–237,[2] and has held inadmissible identification evidence tainted by suggestive confrontation procedures and lacking adequate indicia of reliability,

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[2] "[S]uggestibility inherent in the context of the pretrial identification" is a factor that has led the Court to require the presence of counsel at postindictment lineups. *United States* v. *Wade*, 388 U. S., at 235. If counsel is not present at such a lineup, the identification may not be introduced into evidence at trial and an in-court identification may be made only if the prosecutor establishes "by clear and convincing evidence that the in-court identification [was] based upon observatio[n] . . . of the suspect other than the lineup identification." *Id.*, at 240.

Manson v. *Brathwaite*, *supra*, at 114. "Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." 432 U. S., at 112. An important thrust of our eyewitness identification evidence cases from *Wade* to *Manson*, therefore, has been to prevent impairment of the jury's decisionmaking process by the introduction of unreliable identification evidence.

Second, despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.[3]

> "[E]yewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' "[4]

The powerful impact that much eyewitness identification evidence has on juries, regardless of its reliability,[5] virtually

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[3] "[J]uries unfortunately are often unduly receptive to [identification] evidence . . . ." *Manson* v. *Brathwaite*, 432 U. S. 98, 120 (1977) (MARSHALL, J., dissenting) (footnote omitted). See Loftus, *supra*, at 8–19; P. Wall, Eye-witness Identification in Criminal Cases 19–23 (1965); Hammelmann & Williams, Identification Parades—II, 1963 Crim. L. Rev. 545, 550. See generally A. Yarmey, The Psychology of Eyewitness Testimony (1979).

[4] Loftus, *supra*, at 19 (emphasis supplied). Professor Loftus exhaustively canvasses statistical and psychological evidence which persuasively supports her conclusion that eyewitness identification evidence is "overwhelmingly influential." *Id.*, at 9.

[5] Professor Loftus, *ibid.* (emphasis in original), observes that "[j]urors

mandates that, when such evidence is inadmissible, the jury should know nothing about the evidence. See *Manson* v. *Brathwaite, supra,* at 112. For certainly the resulting prejudice to the defendant cannot be erased by jury instructions. See generally E. Loftus, Eyewitness Testimony 189–190 (1979); P. Devlin, Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases 149–150 (1976). The Court's contrary conclusion cavalierly dismisses the inherent unreliability of identification evidence and its effect on juries—two attributes of confession evidence that led the Court to mandate a "fair hearing" safeguard in *Jackson* v. *Denno.*

Any purported distinction between the instant cases and *Jackson* is plainly specious. In *Jackson,* this Court invalidated a New York State procedure whereby the jury was instructed first to determine the voluntariness of a defendant's confession [6] and then to disregard the confession if it concluded that the confession was involuntary. *Jackson* struck down this practice and required first that the voluntariness

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have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence."

Wall, *supra,* at 19 (footnotes omitted) (emphasis supplied), concludes: "[J]uries are unduly receptive to identification evidence and are not sufficiently aware of its dangers. It has been said that 'positive recognition by well intended uninterested persons is commonly accepted unless the alibi is convincing,' and that evidence of identification, *however untrustworthy,* is 'taken by the average juryman as absolute proof.'"

[6] Distinguishing *Jackson* from the instant cases on the basis that the jury there was first instructed to determine voluntariness is not persuasive. That consideration goes to the weight given the evidence by the jury. *Jackson* itself recognized that the lingering effect of the involuntary confession might be decisive in the jury's deliberations. Such an effect is no less likely to be decisive in the case of powerful eyewitness identification evidence that a jury has been instructed to ignore. In both instances, peculiarly powerful evidence must leave an indelible impact on a juror's mind. See n. 7, *infra.*

of a confession be determined by the judge before its admission in evidence, and second that the jury not be allowed to consider an inadmissible confession. *Jackson* refused to rely on the curative effect of jury instructions where the trial judge had not applied " 'the exclusionary rules before permitting evidence to be submitted to the jury.' " 378 U. S., at 382, n. 10, quoting Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 327 (1954).[7]

For purposes of the instant cases, three factors central to our decision in *Jackson* are apposite. First, *Jackson* stated, as the Court today notes, *ante*, at 347, "that the Fourteenth Amendment forbids the use of involuntary confessions . . . because of the probable unreliability of confessions that are obtained in a manner deemed coercive." 378 U. S., at 385–386. Second, *Jackson* stated, as the Court today further notes, *ante*, at 347, that involuntary confessions are inadmissible "because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.' " 378 U. S., at 386.[8] Third, because of the sensitive nature of confession

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[7] The Court in *Jackson* noted:

" 'Due Process of law requires that a coerced confession be excluded from consideration by the jury. It also requires that the issue of coercion be tried by an unprejudiced trier, and, regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. . . . And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed.' " 378 U. S., at 382–383, n. 10, quoting E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 104–105 (1956).

[8] Of course, police misbehavior is not always so lacking in subtlety that involuntary confessions are invariably wrenched from an accused by force. Thus, indirect methods of interrogation which seek to elicit a statement

evidence, *Jackson* found that instructions were not adequate to assure that the jury would ignore involuntary confession evidence:

> "Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has also been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false.[9] If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession." *Id.*, at 388 (footnote omitted).

Similar considerations plainly require a hearing in the case of identification evidence. First, there can be little doubt that identification evidence is as potentially unreliable as confession evidence. See *supra*, at 350–352. Second, suggestive confrontation procedures which, in the totality of the circumstances, create " 'a very substantial likelihood of irreparable misidentification,' " *Manson* v. *Brathwaite*, 432 U. S., at 116, quoting *Simmons* v. *United States*, 390 U. S. 377, 384 (1968), are as impermissible a police practice as the securing of a custodial confession determined, in the totality of the circumstances, to be involuntary, see *United States* v. *Washington*, 431 U. S. 181, 188 (1977); cf. *North Carolina* v. *Butler*,

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from a custodial suspect may also warrant a conclusion of involuntariness. See *Rhode Island* v. *Innis*, 446 U. S. 291, 301 (1980) (interrogation includes actions which "the police should know are reasonably likely to elicit an incriminating response"); cf. *Brewer* v. *Williams*, 430 U. S. 387 (1977) (Sixth Amendment violation).

[9] See n. 6, *supra*.

441 U. S. 369, 374–375 (1979) (waiver). See also *Manson* v. *Brathwaite, supra,* at 112; *Foster* v. *California,* 394 U. S. 440, 442–443 (1969); *United States* v. *Wade,* 388 U. S., at 228–229, 232–235; *Stovall* v. *Denno,* 388 U. S. 293, 302 (1967). And third, because of the extraordinary impact of much eyewitness identification evidence, juries hearing such evidence will be no more able fully to ignore it upon instruction of the trial judge than will juries hearing confession evidence.[10] To expect a jury to engage in the collective mental gymnastic of segregating and ignoring such testimony upon instruction is utterly unrealistic. The Court's bald assertion, therefore, that jury instructions are adequate to protect the accused, is as untrue for identification evidence as it is for involuntary confessions.

Nor can it be assumed, as the Court has, that cross-examination will protect the accused in this circumstance. That is no more true here than it was in *Jackson,* where the defendant was also allowed to cross-examine on the question of voluntariness. Cross-examination, of course, affects the weight and credibility given by the jury to evidence,[11] but cross-examination is both an ineffective and a wrong tool for purging inadmissible identification evidence from the jurors' minds. It is an ineffective tool because all of the scientific

[10] In both of these cases, the eyewitnesses were also the victims of the crimes. Not only does that dual status affect the reliability of the identification, but it also is likely to make the testimony more powerful and thus less curable by jury instructions. Clearly, this is not a case where 14 reliable identifications were properly received in evidence, but a 15th by a nonvictim witness was subject to suggestive confrontation procedures and was unreliable, thereby raising the possibility that the error was harmless beyond a reasonable doubt.

[11] In *Manson* v. *Brathwaite,* 432 U. S., at 116, the Court stated:

"We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."

evidence suggests that much eyewitness identification testimony has an unduly powerful effect on jurors. Thus, the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination. See generally E. Loftus, Eyewitness Testimony 9 (1979). Cross-examination is also a wrong tool in the sense that jury instructions are the means normally employed to cure the erroneous introduction of evidence. At best, cross-examination might diminish the weight the jury accords to the admissible evidence. The likelihood is, however, that the jury would continue to give the improperly admitted evidence substantial weight, even if properly instructed to disregard it.

It is clear beyond peradventure, I submit, that because of the dangers to a just result inherent in identification evidence—its unreliability and its unusual impact on the jury—a "fair hearing and a reliable determination" of admissibility, *Jackson* v. *Denno*, 378 U. S., at 377, are constitutionally mandated. The Due Process Clause obviously precludes the jury from convicting on unreliable identification evidence. *Manson* v. *Brathwaite, supra.*[12] But the only way to be sure that the jury will not rest its verdict on improper identification evidence, as a practical matter, is by not permitting the jury to hear it in the first place. A *Jackson* v. *Denno* hearing would expediently accomplish that purpose.[13] I believe that the Due Process Clause requires no less.

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[12] In *Jackson* v. *Denno*, the Court was concerned that the jury not hear a defendant's confession until a trial judge had made a preliminary determination of voluntariness. The Court assumed that were this not done, a deleterious impact on the jury's deliberations would operate:

"[I]t is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant and which would permit the jury to consider the confession in adjudicating guilt or innocence." 378 U. S., at 387.

[13] The Court errs in any event in deciding these cases on the premise that petitioners request a *per se* rule requiring a hearing out of the jury's presence in every case. In the first place, petitioners rely substantially

A large and distinguished group shares my view. The lower federal courts with virtual unanimity have encouraged the type of hearing sought by petitioners.[14] As already noted,

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on authority which does not go that far. Brief for Petitioners 43–45. Clearly, they have sought reversal of their convictions on the basis that they were entitled to such a hearing. Moreover, there is no question here that they raised a colorable claim that the confrontation procedures were impermissibly suggestive. See, *e. g.*, *United States ex rel. Fisher* v. *Driber*, 546 F. 2d 18, 22 (CA3 1976); *United States* v. *Cranson*, 453 F. 2d 123, 127 (CA4 1971), cert. denied, 406 U. S. 909 (1972).

If the Court's result is out of concern for not adding another layer of complexity to criminal litigation, that is understandable, but not sufficient to supplant an accused's constitutional right. Moreover, a rule requiring the defendant to proffer some minimum quantum of evidence showing the suggestiveness of the confrontation procedures would eliminate frivolous requests. See, *e. g.*, *United States ex rel. Fisher* v. *Driber*, *supra*, at 22.

[14] *United States ex rel. Fisher* v. *Driber*, *supra*, at 22 (requiring hearing outside presence of jury where motion for such hearing is not frivolous); *United States* v. *Smith*, 546 F. 2d 1275, 1279 (CA5 1977) (evidentiary hearing not required where no critical facts in dispute); *United States* v. *Mitchell*, 540 F. 2d 1163, 1166 (CA3 1976) (defendant could have "requested a hearing outside the presence of the jury in accordance with *Neil* v. *Biggers*"), cert. denied, 429 U. S. 1099 (1977); *Nassar* v. *Vinzant*, 519 F. 2d 798, 802, n. 4 (CA1) (commending hearing out of jury's presence), cert. denied, 423 U. S. 898 (1975); *United States* v. *Cranson*, *supra*, at 125–126 ("evidentiary hearing outside the jury's presence is required" upon motion to suppress); *Haskins* v. *United States*, 433 F. 2d 836, 838 (CA10 1970) (requiring hearing outside of jury's presence); *United States* v. *Ranciglio*, 429 F. 2d 228, 230 (CA8) ("trial court, out of the hearing and presence of the jury, conducted a hearing as required in *Wade*"), cert. denied, 400 U. S. 959 (1970); *United States ex rel. Phipps* v. *Follette*, 428 F. 2d 912, 913, n. 1 (CA2) ("commend[ing] . . . practice" of hearing out of jury's presence), cert. denied, 400 U. S. 908 (1970); *United States* v. *Allison*, 414 F. 2d 407, 410 (CA9) (requiring hearing outside of jury's presence), cert. denied, 396 U. S. 968 (1969); *United States* v. *Broadhead*, 413 F. 2d 1351, 1359 (CA7 1969) (pretrial hearing approved), cert. denied, 396 U. S. 1017 (1970); *Clemons* v. *United States*, 133 U. S. App. D. C. 27, 34, 408 F. 2d 1230, 1237 (1968) (en banc) (requiring hearing outside of jury's presence or disclosure of prosecutor's evidence), cert. denied, 394 U. S. 964 (1969). Even the Court of Appeals deciding these cases stated that it had "no

the Court too states that "[a] judicial determination outside the presence of the jury of the admissibility of identification evidence may often be advisable [and i]n some circumstances . . . constitutionally necessary." *Ante*, at 349. I should think it follows from this congruence of opinion on the desirability of such a judicial hearing that evolving standards of justice [15] mandate such a hearing whenever a defendant proffers sufficient evidence to raise a colorable claim that police confrontation procedures were impermissibly suggestive. See, *e. g.*, *United States ex rel. Fisher* v. *Driber*, 546 F. 2d 18, 22 (CA3 1976).

In the instant cases, the suggestiveness of the confrontation procedures was clearly shown, and equally clearly cross-examination in front of the jury was inadequate to test the reliability of the evidence because of the undoubted inhibiting effect on cross-examination from fear that rigorous questioning of hostile witnesses would strengthen the eyewitnesses' testimony and impress it upon the jury. See *United States* v. *Wade*, 388 U. S., at 240–241.[16] In any event, the record

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doubt that" a hearing out of the jury's presence "is the preferable procedure." *Summitt* v. *Bordenkircher*, 608 F. 2d 247, 250 (CA6 1979).

In addition, the Commonwealth of Kentucky, where petitioners were tried and convicted, appears to require a hearing out of the presence of the jury, upon defendant's motion, for confession and for search evidence. See Ky. Rule Crim. Proc. 9.78. In addition, *Moore* v. *Commonwealth*, 569 S. W. 2d 150, 153 (Ky. 1978), decided after petitioners were convicted, held that the trial court's refusal to hold a suppression hearing to determine the admissibility of identification evidence constituted error. Previous Kentucky appellate decisions had reached a similar conclusion. *E. g.*, *Francis* v. *Commonwealth*, 468 S. W. 2d 287 (App. 1971).

[15] See, *e. g.*, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 669 (1966) (equal protection); *Trop* v. *Dulles*, 356 U. S. 86, 100–101 (1958) (plurality opinion of Warren, C. J.) (Eighth Amendment).

[16] It is no answer to say, as the Court does, that the record does not reflect that petitioners' respective counsel were deterred by the presence of the jury, for the simple reason that a cold record cannot reflect questions not asked.

is inadequate to decide that petitioners could not have succeeded in foreclosing admission of the evidence if they had been afforded a hearing out of the jury's presence in the first place. Accordingly, I would remand for such further proceedings as are necessary to give these petitioners "a fair hearing and a reliable determination," *Jackson* v. *Denno*, 378 U. S., at 377, that the identification evidence in each trial was not erroneously admitted.

UNITED STATES *v.* MORRISON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-395. Argued December 10, 1980—Decided January 13, 1981

Federal agents, aware that respondent had been indicted on federal drug charges and had retained counsel, met with her without her counsel's knowledge or permission, seeking her cooperation in a related investigation. The agents disparaged respondent's counsel and indicated that she would gain various benefits if she cooperated and would face a stiff jail term if she did not, but she declined to cooperate and notified her attorney. The agents visited respondent again in the absence of counsel, but she did not agree to cooperate with them, nor did she incriminate herself or supply any information pertinent to her case. Subsequently, respondent moved to dismiss the indictment with prejudice on the ground that the agents' conduct violated her Sixth Amendment right to counsel. The agents' egregious behavior was described as having "interfered" in some unspecified way with respondent's right to counsel, but it was not alleged that the claimed violation had prejudiced the quality or effectiveness of her legal representation or that the agents' conduct had any adverse impact on her legal position. The District Court denied the motion and respondent, pursuant to a prior agreement with the Government, entered a conditional plea of guilty to one count of the indictment. The Court of Appeals reversed, holding that respondent's Sixth Amendment right to counsel had been violated and that whether or not any tangible effect upon her representation had been demonstrated or alleged, the appropriate remedy was dismissal of the indictment with prejudice.

Held: Assuming, *arguendo*, that the Sixth Amendment was violated in the circumstances of this case, nevertheless the dismissal of the indictment was not appropriate, absent a showing of any adverse consequence to the representation respondent received or to the fairness of the proceedings leading to her conviction. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Absent demonstrable prejudice, or substantial threat thereof, from the violation of the Sixth Amendment, there is no basis for imposing a remedy in the criminal proceeding, which can go forward with full recognition of

the defendant's right to counsel and to a fair trial, and dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate. Pp. 364–367.

602 F. 2d 529, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

Peter Buscemi argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey, Sidney M. Glazer,* and *Joel Gershowitz.*

Salvatore J. Cucinotta, by appointment of the Court, 449 U. S. 812, argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

Hazel Morrison, respondent here, was indicted on two counts of distributing heroin in violation of 21 U. S. C. § 841 (a)(1). She retained private counsel to represent her in the impending criminal proceedings. Thereafter, two agents of the Drug Enforcement Agency, aware that she had been indicted and had retained counsel, sought to obtain her cooperation in a related investigation. They met and conversed with her without the knowledge or permission of her counsel. Furthermore, in the course of the conversation, the agents disparaged respondent's counsel, stating that respondent should think about the type of representation she could expect for the $200 retainer she had paid him and suggesting that she could be better represented by the public defender. In addition, the agents indicated that respondent would gain various benefits if she cooperated but would face a stiff jail term if she did not. Respondent declined to cooperate and immediately notified her attorney. The agents visited respondent again in the absence of counsel, but at no time did respondent agree to cooperate with them, incriminate herself, or supply any in-

**Sheldon Portman* filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging affirmance.

formation pertinent to her case. Contrary to the agents' advice, respondent continued to rely upon the services of the attorney whom she had retained.

Respondent subsequently moved to dismiss the indictment with prejudice on the ground that the conduct of the agents had violated her Sixth Amendment right to counsel. The motion contained no allegation that the claimed violation had prejudiced the quality or effectiveness of respondent's legal representation; nor did it assert that the behavior of the agents had induced her to plead guilty, had resulted in the prosecution having a stronger case against her, or had any other adverse impact on her legal position. The motion was based solely upon the egregious behavior of the agents, which was described as having "interfered" in some unspecified way with respondent's right to counsel. This interference, unaccompanied by any allegation of adverse effect, was urged as a sufficient basis for the requested disposition.

The District Court denied the motion and respondent, pursuant to a prior agreement with the Government, entered a conditional plea of guilty to one count of the indictment.[1] On appeal to the Court of Appeals for the Third Circuit, the judgment of the District Court was reversed. The appellate court concluded that respondent's Sixth Amendment right to counsel had been violated and that whether or not any tangible effect upon respondent's representation had been demonstrated or alleged, the appropriate remedy was dismissal of the indictment with prejudice. 602 F. 2d 529 (1979). We granted the United States' petition for certiorari to consider whether this extraordinary relief was appropriate in the absence of some adverse consequence to the representation re-

[1] A second count was dismissed as required by the plea agreement. The plea was conditioned on respondent's right to appeal the District Court's denial of the motion to dismiss. The Third Circuit has approved this procedure. *United States* v. *Moskow*, 588 F. 2d 882 (1978); *United States* v. *Zudick*, 523 F. 2d 848 (1975). We express no view on the propriety of such conditional pleas.

spondent received or to the fairness of the proceedings leading to her conviction. 448 U. S. 906. We reverse.

The United States initially urges that absent some showing of prejudice, there could be no Sixth Amendment violation to be remedied. Because we agree with the United States, however, that the dismissal of the indictment was error in any event, we shall assume, without deciding, that the Sixth Amendment was violated in the circumstances of this case.

The Sixth Amendment provides that an accused shall enjoy the right "to have the Assistance of Counsel for his defense." This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process. *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963); *Glasser* v. *United States*, 315 U. S. 60, 69–70, 75–76 (1942); *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938). Our cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective. *Moore* v. *Illinois*, 434 U. S. 220 (1977); *Geders* v. *United States*, 425 U. S. 80 (1976); *Herring* v. *New York*, 422 U. S. 853 (1975); *Gilbert* v. *California*, 388 U. S. 263 (1967); *United States* v. *Wade*, 388 U. S. 218 (1967); *Massiah* v. *United States*, 377 U. S. 201 (1964).

At the same time and without detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Our relevant cases reflect this approach. In *Gideon* v. *Wainwright*, *supra*, the defendant was totally denied the assistance of counsel at his criminal trial. In *Geders* v. *United States*, *supra*, *Herring* v. *New York*, *supra*, and *Powell* v. *Alabama*, 287 U. S. 45 (1932), judicial action before or during trial prevented counsel from being fully effective. In *Black* v. *United States*, 385

U. S. 26 (1966), and *O'Brien* v. *United States*, 386 U. S. 345 (1967), law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer. None of these deprivations, however, resulted in the dismissal of the indictment. Rather, the conviction in each case was reversed and the Government was free to proceed with a new trial. Similarly, when before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. *Gilbert* v. *California, supra; United States* v. *Wade, supra; Massiah* v. *United States, supra.* In addition, certain violations of the right to counsel may be disregarded as harmless error. Compare *Moore* v. *Illinois, supra,* at 232, with *Chapman* v. *California,* 386 U. S. 18, 23, and n. 8 (1967).

Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.[2] This has been the result reached where a Fifth

[2] There is no claim here that there was continuing prejudice which, because it could not be remedied by a new trial or suppression of evidence,

Amendment violation has occurred,[3] and we have not suggested that searches and seizures contrary to the Fourth Amendment warrant dismissal of the indictment. The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression.

Here, respondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against

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called for more drastic treatment. Cf. *United States* v. *Marion*, 404 U. S. 307, 325–326 (1971). Indeed, there being no claim of any discernible taint, even the traditional remedies were beside the point. The Court of Appeals seemed to reason that because there was no injury claimed and because other remedies would not be fruitful, dismissal of the indictment was appropriate. But as the dissent below indicated, it is odd to reserve the most drastic remedy for those situations where there has been no discernible injury or other impact.

The Court of Appeals also thought dismissal was appropriate to deter deliberate infringements of the right to counsel. But this proves too much, for it would warrant dismissal, not just in this case, but in any case where there has been a knowing violation. Furthermore, we note that the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness.

[3] This is clear from *United States* v. *Blue*, 384 U. S. 251, 255 (1966):

"Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. . . . Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." (Footnote omitted.)

respondent Morrison, much less the drastic relief granted by the Court of Appeals.[4]

In arriving at this conclusion, we do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings. We simply conclude that the solution provided by the Court of Appeals is inappropriate where the violation, which we assume has occurred, has had no adverse impact upon the criminal proceedings.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.

So ordered.

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[4] The position we have adopted finds substantial support in the Courts of Appeals. *United States* v. *Jimenez*, 626 F. 2d 39, 41–42 (CA7 1980); *United States* v. *Artuso*, 618 F. 2d 192, 196–197 (CA2 1980); *United States* v. *Glover*, 596 F. 2d 857, 861–864 (CA9 1979); *United States* v. *Crow Dog*, 532 F. 2d 1182, 1196–1197 (CA8 1976); *United States* v. *Acosta*, 526 F. 2d 670, 674 (CA5 1976); but see *United States* v. *McCord*, 166 U. S. App. D. C. 1, 15–18, 509 F. 2d 334, 348–351 (1974) (en banc) (dicta). The Supreme Judicial Court of Massachusetts has adopted a contrary view. See *Commonwealth* v. *Manning*, 373 Mass. 438, 367 N. E. 2d 635 (1977).

FIRESTONE TIRE & RUBBER CO. *v.* RISJORD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79–1420. Argued November 12, 1980—Decided January 13, 1981

Respondent is lead counsel for the plaintiffs in four consolidated product-liability suits in Federal District Court against petitioner and other manufacturers. Petitioner moved to disqualify respondent from further representation of the plaintiffs because of an alleged conflict of interest arising from the fact that petitioner's liability insurer was also an occasional client of respondent's law firm. Petitioner argued that respondent's representation of the insurer would give him an incentive to structure the plaintiffs' claims for relief so as to enable the insurer to avoid any liability, thus increasing petitioner's own potential liability. In accordance with the District Court's order, respondent obtained the consent of both the plaintiffs and the insurer to his continuing representation, and the court then allowed him to continue his representation of the plaintiffs. Petitioner filed a notice of appeal pursuant to 28 U. S. C. § 1291, which vests the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." The Court of Appeals held that district court orders denying disqualification motions were not immediately appealable under § 1291, but because it was overruling prior cases, the court made its decision prospective only and, on the merits, affirmed the District Court's order permitting respondent to continue representing the plaintiffs.

Held:

1. Orders denying motions to disqualify the opposing party's counsel in a civil case are not appealable final decisions under § 1291. Such an order does not fall within the "collateral order" exception of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, to the requirement that all appeals under § 1291 must await final judgment on the merits in the underlying litigation. Petitioner has made no showing, as required under the *Cohen* doctrine of immediately appealable "collateral orders," that an order denying disqualification is effectively unreviewable on appeal from a final judgment on the merits. The propriety of a district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally after final judgment, and should the court of appeals con-

clude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial. Pp. 373–378.

2. The Court of Appeals, after properly concluding that the District Court's order was not immediately appealable under § 1291, erred in reaching the merits of the District Court's order. The finality requirement of § 1291 is jurisdictional in nature. If an appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus a jurisdictional ruling may never be made prospective only. Pp. 379–380.

612 F. 2d 377, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion concurring in the result, in which BURGER, C. J., joined, *post*, p. 380.

Harvey M. Grossman argued the cause for petitioner. With him on the briefs was *William Freivogel.*

John R. Gibson argued the cause for respondent. With him on the briefs were *Martin J. Purcell* and *Morris J. Nunn.**

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a party may take an appeal, pursuant to 28 U. S. C. § 1291,[1] from a district court order denying a motion to disqualify counsel for the opposing party in a civil case. The United States Court of Appeals for the Eighth Circuit held that such orders are not appealable, but made its decision prospective only and there-

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**Solicitor General McCree, Deputy Solicitor General Frey,* and *Edwin S. Kneedler* filed a brief for the United States as *amicus curiae.*

[1] Title 28 U. S. C. § 1291 provides in relevant part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

fore reached the merits of the challenged order. We hold that orders denying motions to disqualify counsel are not appealable final decisions under § 1291, and we therefore vacate the judgment of the Court of Appeals and remand with instructions that the appeal be dismissed for lack of jurisdiction.

I

Respondent is lead counsel for the plaintiffs in four product-liability suits seeking damages from petitioner and other manufacturers of multipiece truck tire rims for injuries caused by alleged defects in their products.[2] The complaints charge petitioner and the other defendants with various negligent, willful, or intentional failures to correct or to warn of the supposed defects in the rims. Plaintiffs seek both compensatory and exemplary damages. App. 6–72.

Petitioner was at all relevant times insured by Home Insurance Co. (Home) under a contract providing that Home would be responsible only for some types of liability beyond a minimum "deductible" amount. Home was also an occasional client of respondent's law firm.[3] Based on these facts, petitioner in May 1979 filed a motion to disqualify respondent from further representation of the plaintiffs. Petitioner argued that respondent had a clear conflict of interest because his representation of Home would give him an incentive to structure plaintiffs' claims for relief in such a way as to enable the insurer to avoid any liability. This in turn, petitioner

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[2] Pursuant to 28 U. S. C. § 1407, the Judicial Panel on Multidistrict Litigation has ordered these and other suits against multipiece truck tire rim manufacturers consolidated for trial in the United States District Court for the Western District of Missouri. App. 73.

[3] The firm included Home in a list of its clients in the Martindale-Hubbell Law Directory and had occasionally represented the insurer on matters unrelated to the multipiece rim litigation. At the time that petitioner filed its disqualification motion, respondent was defending Home and five other carriers against a suit on certain fire insurance policies. Home does not pay respondent or his firm a retainer.

argued, could increase its own potential liability. Home had in fact advised petitioner in the course of the litigation that its policy would cover neither an award of compensatory damages for willful or intentional acts nor any award of exemplary or punitive damages.[4] The District Court entered a pretrial order requiring that respondent terminate his representation of the plaintiffs[5] unless both the plaintiffs and Home consented to his continuing representation.[6] *Id.*, at 157, 160.

In accordance with the District Court's order, respondent filed an affidavit in which he stated that he had informed both the plaintiffs and Home of the potential conflict and that neither had any objection to his continuing representation of them both. He filed supporting affidavits executed by the plaintiffs and by a representative of Home. Because he had satisfied the requirements of the pretrial order, respondent was able to continue his representation of the plaintiffs. Petitioner objected to the District Court's decision to permit respondent to continue his representation if he met the stated

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[4] In April 1979 Home sent letters containing similar advice to the defendants in some of the other consolidated suits. The plaintiffs in these other actions were not represented by respondent.

[5] In the alternative, the District Court stated that respondent could terminate his representation of Home in the unrelated matter. See n. 3, *supra*.

[6] The trial court based its determination that a potential conflict existed on its interpretation of Disciplinary Rule 5–105 of the Code of Professional Responsibility, most of which had been adopted verbatim as a local rule of court. That rule prohibits a lawyer from "continu[ing] multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client" except when "it is obvious that he can adequately represent the interest of each and if each consents to the representation . . . ." The District Court agreed with petitioner that it was likely that the dual representation would adversely affect respondent's "'exercise of his independent judgment . . .'" App. 160, quoting *International Business Machines Corp.* v. *Levin*, 579 F. 2d 271, 280 (CA3 1978). It therefore ordered that he "either comply with the consent requirement . . . or terminate his representation . . . ." App. 160.

conditions, and therefore filed a notice of appeal pursuant to 28 U. S. C. § 1291.[7]

Although it did not hear oral argument on the appeal, the Eighth Circuit decided the case en banc and affirmed the trial court's order permitting petitioner to continue representing the plaintiffs.[8] *In re Multi-Piece Rim Products Liability*, 612 F. 2d 377 (1980). Before considering the merits of the appeal, the court reconsidered and overruled its prior decisions holding that orders denying disqualification motions were immediately appealable under § 1291. The Court of Appeals reasoned that such orders did not fall within the collateral-order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), which allows some appeals prior to final judgment. Because it was overruling prior cases, the court stated that it would reach the merits of the challenged order "[i]n fairness to the appellant in the instant case," but

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[7] The District Court certified its pretrial order on disqualification for interlocutory appeal pursuant to 28 U. S. C. § 1292 (b), which provides in relevant part:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . ."

Neither party elected to proceed under § 1292 (b). Respondent chose to comply with the order rather than appeal. Petitioner chose to appeal the denial of its motion under § 1291 rather than under § 1292 (b). After filing its notice of appeal, petitioner moved that respondent be held in contempt for allegedly failing to comply with the pretrial order, but this motion was subsequently withdrawn.

[8] The Court of Appeals also stated that orders *granting* motions to disqualify counsel would be appealable under § 1291. 612 F. 2d, at 378. That question is not presented by the instant petition, and we express no opinion on it. Neither do we express any view on whether an order denying a disqualification motion in a criminal case would be appealable under § 1291.

held that in the future, appellate review of such orders would have to await final judgment on the merits of the main proceeding.[9] 612 F. 2d, at 378–379. We granted certiorari, 446 U. S. 934 (1980), to resolve a conflict among the Circuits on the appealability question.[10]

II

Under § 1291, the courts of appeals are vested with "jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." We have consistently interpreted this language as indicating that a party may not take an appeal under this section until there has been "a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers*

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[9] During pendency of its appeal to the Eighth Circuit, petitioner filed a federal-court action against Home, charging that by consenting to respondent's continuing representation of the plaintiffs in the multipiece rim products-liability suits, the insurer had breached its fiduciary duty to petitioner. App. 217. At the time of oral argument, counsel for petitioner represented that no resolution had been reached in that litigation. Tr. of Oral Arg. 7–8.

[10] In addition to the Eighth Circuit decision currently before us, five other Circuits now follow the rule that denials of disqualification motions are not appealable. See *In re Continental Investment Corp.*, 637 F. 2d 1 (CA1 1980); *Armstrong* v. *McAlpin*, 625 F. 2d 433 (CA2 1980), cert. pending, No. 80–431, overruling *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F. 2d 800 (CA2 1974); *Melamed* v. *ITT Continental Baking Co.*, 592 F. 2d 290 (CA6 1979) (*Melamed II*), overruling *Melamed* v. *ITT Continental Baking Co.*, 534 F. 2d 82 (CA6 1976) (*Melamed I*); *Community Broadcasting of Boston, Inc.* v. *FCC*, 178 U. S. App. D. C. 256, 546 F. 2d 1022 (1976); *Cord* v. *Smith*, 338 F. 2d 516 (CA9 1964). Five Circuits permit such appeals under § 1291. See *Westinghouse Electric Corp.* v. *Kerr-McGee Corp.*, 580 F. 2d 1311 (CA7 1978); *MacKethan* v. *Peat, Marwick, Mitchell & Co.*, 557 F. 2d 395 (CA4 1977); *Kroungold* v. *Triester*, 521 F. 2d 763 (CA3 1975); *Fullmer* v. *Harper*, 517 F. 2d 20 (CA10 1975); *Uniweld Products, Inc.* v. *Union Carbide Corp.*, 385 F. 2d 922 (CA5 1967), cert. denied, 390 U. S. 921 (1968).

& Lybrand v. *Livesay*, 437 U. S. 463, 467 (1978), quoting *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940). See *DiBella* v. *United States*, 369 U. S. 121, 124 (1962). The rule also serves the important purpose of promoting efficient judicial administration. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 170 (1974).

Our decisions have recognized, however, a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits. In *Cohen* v. *Beneficial Industrial Loan Corp., supra*, we held that a "small class" of orders that did not end the main litigation were nevertheless final and appealable pursuant to § 1291. *Cohen* was a shareholder's derivative action in which the Federal District Court refused to apply a state statute requiring a plaintiff in such a suit to post security for costs. The defendant appealed the ruling without awaiting final judgment on the merits, and the Court of Appeals ordered the trial court to require that costs be posted. We held that the Court of Appeals properly assumed jurisdiction of the appeal pursuant to § 1291 because the District Court's order constituted a final determination of a claim "separable from, and collateral to," the merits of the main proceeding, because it was "too important to be denied re-

view," and because it was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546. *Cohen* did not establish new law; rather, it continued a tradition of giving § 1291 a "practical rather than a technical construction." *Ibid.* See, *e. g.*, *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 413–414 (1926); *Bronson* v. *LaCrosse & Milwaukee R. Co.*, 2 Black 524, 530–531 (1863); *Forgay* v. *Conrad*, 6 How. 201, 203 (1848); *Whiting* v. *Bank of the United States*, 13 Pet. 6, 15 (1839). We have recently defined this limited class of final "collateral orders" in these terms: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, *supra*, at 468 (footnote omitted). See *Abney* v. *United States*, 431 U. S. 651, 658 (1977).

Because the litigation from which the instant petition arises had not reached final judgment at the time the notice of appeal was filed,[11] the order denying petitioner's motion to disqualify respondent is appealable under § 1291 only if it falls within the *Cohen* doctrine. The Court of Appeals held that it does not, and 5 of the other 10 Circuits have also reached the conclusion that denials of disqualification motions are not immediately appealable "collateral orders."[12] We agree with these courts that under *Cohen* such an order is not subject to appeal prior to resolution of the merits.

An order denying a disqualification motion meets the first part of the "collateral order" test. It "conclusively determine[s] the disputed question," because the only issue is whether challenged counsel will be permitted to continue his

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[11] Counsel for respondent represented at oral argument in this Court that the case was, at that time, in the discovery stage. Tr. of Oral Arg. 35–36.

[12] See n. 10, *supra*.

representation. In addition, we will assume, although we do not decide, that the disqualification question "resolve[s] an important issue completely separate from the merits of the action," the second part of the test. Nevertheless, petitioner is unable to demonstrate that an order denying disqualification is "effectively unreviewable on appeal from a final judgment" within the meaning of our cases.

In attempting to show why the challenged order will be effectively unreviewable on final appeal, petitioner alleges that denying immediate review will cause it irreparable harm. It is true that the finality requirement should "be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered," *Mathews* v. *Eldridge*, 424 U. S. 319, 331, n. 11 (1976). In support of its assertion that it will be irreparably harmed, petitioner hints at "the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty," Brief for Petitioner 15, and at "the effect of such a tainted proceeding in frustrating public policy," *id.*, at 16. But petitioner fails to supply a single concrete example of the indelible stamp or taint of which it warns. The only ground that petitioner urged in the District Court was that respondent might shape the products-liability plaintiffs' claims for relief in such a way as to increase the burden on petitioner. Our cases, however, require much more before a ruling may be considered "effectively unreviewable" absent immediate appeal.

To be appealable as a final collateral order, the challenged order must constitute "a complete, formal and, in the trial court, final rejection," *Abney* v. *United States*, *supra*, at 659, of a claimed right "where denial of immediate review would render impossible any review whatsoever," *United States* v. *Ryan*, 402 U. S. 530, 533 (1971). Thus we have permitted appeals prior to criminal trials when a defendant has claimed that he is about to be subjected to forbidden double jeopardy,

Abney v. *United States, supra,* or a violation of his constitutional right to bail, *Stack* v. *Boyle,* 342 U. S. 1 (1951), because those situations, like the posting of security for costs involved in *Cohen,* "each involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial." *United States* v. *MacDonald,* 435 U. S. 850, 860 (1978). By way of contrast, we have generally denied review of pretrial discovery orders, see, *e. g., United States* v. *Ryan, supra; Cobbledick* v. *United States, supra.* Our rationale has been that in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling. See *Cobbledick* v. *United States, supra,* at 327. We have also rejected immediate appealability under § 1291 of claims that "may fairly be assessed" only after trial, *United States* v. *MacDonald, supra,* at 860, and those involving "considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Coopers & Lybrand* v. *Livesay,* 437 U. S., at 469, quoting *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555, 558 (1963).

An order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not. The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits. In the case before us, petitioner has made no showing that its opportunity for meaningful review will perish

unless immediate appeal is permitted. On the contrary, should the Court of Appeals conclude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial. That remedy seems plainly adequate should petitioner's concerns of possible injury ultimately prove well founded. As the Second Circuit has recently observed, the potential harm that might be caused by requiring that a party await final judgment before it may appeal even when the denial of its disqualification motion was erroneous does not "diffe[r] in any significant way from the harm resulting from other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection or orders denying motions for recusal of the trial judge." *Armstrong* v. *McAlpin*, 625 F. 2d 433, 438 (1980), cert. pending, No. 80–431. But interlocutory orders are not appealable "on the mere ground that they may be erroneous." *Will* v. *United States*, 389 U. S. 90, 98, n. 6 (1967). Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291. This we decline to do.[13]

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[13] Although there may be situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to disqualify opposing counsel, it is not necessary, in order to resolve those situations, to create a general rule permitting the appeal of all such orders. In the proper circumstances, the moving party may seek sanctions short of disqualification, such as a protective order limiting counsel's ability to disclose or to act on purportedly confidential information. If additional facts in support of the motion develop in the course of the litigation, the moving party might ask the trial court to reconsider its decision. Ultimately, if dissatisfied with the result in the District Court and absolutely determined that it will be harmed irreparably, a party may seek to have the

III

We hold that a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior to final judgment in the underlying litigation.[14] Insofar as the Eighth Circuit reached this conclusion, its decision is correct. But because its decision was contrary to precedent in the Circuit, the court went further and reached the merits of the order appealed from. This approach, however, overlooks the fact that the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only. We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits.[15] Con-

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question certified for interlocutory appellate review pursuant to 28 U. S. C. § 1292 (b), see n. 7, *supra*, and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available. See *In re Continental Investment Corp.*, 637 F. 2d, at 7; *Community Broadcasting of Boston, Inc.* v. *FCC*, 178 U. S. App. D. C., at 262, 546 F. 2d, at 1028. See generally Comment, The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts, 45 U. Chi. L. Rev. 450, 468–480 (1978). We need not be concerned with the availability of such extraordinary procedures in the case before us, because petitioner has made no colorable claim that the harm it might suffer if forced to await the final outcome of the litigation before appealing the denial of its disqualification motion is any greater than the harm suffered by any litigant forced to wait until the termination of the trial before challenging interlocutory orders it considers erroneous.

[14] The United States, in its brief *amicus curiae*, has challenged petitioner's standing to attack the order permitting respondent to continue his representation of the plaintiffs. In light of our conclusion that the Eighth Circuit was without jurisdiction to hear petitioner's appeal, we have no occasion to address the standing issue.

[15] Two other Courts of Appeals that have overruled their precedent and held that orders denying disqualification motions are not immediately ap-

sequently, the judgment of the Eighth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction. See *DiBella* v. *United States*, 369 U. S., at 133.

So ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring in the result.

I agree with the result in this case and the analysis of the Court so far as it concerns the question whether an order denying disqualification of counsel is "effectively unreviewable on appeal from the final judgment." The Court's answer to this question is dispositive on the appealability issue. Since it is completely unnecessary to do so, however, I would not state, as the Court does, *ante*, at 375–376:

> "An order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively determine[s] the disputed question,' because the only issue is whether challenged counsel will be permitted to continue his representation."

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), Justice Jackson stressed that the order before the Court was "a final disposition of a claimed right" and specifically distinguished a case in which the matter was "subject to reconsideration from time to time." *Id.*, at 546–547. Just recently in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), we held that an order denying class certification was

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pealable have similarly made their decisions prospective only and therefore reached the merits of the disputes before them. See *Armstrong* v. *McAlpin*, 625 F. 2d, at 441–442 (citing need to provide guidance to district courts and to avoid waste of judicial resources); *Melamed II*, 592 F. 2d, at 295 (earlier ruling in *Melamed I* established appealability as law of the case). To the extent that the rationales of those cases would allow a court to agree to decide the merits of a case over which it is without jurisdiction, we respectfully disagree.

not appealable under the collateral-order doctrine, in part because such an order is "subject to revision in the District Court." *Id.*, at 469. The possibility that a district judge would reconsider his determination was highly significant in *United States* v. *MacDonald*, 435 U. S. 850, 858–859 (1978), where the Court held that the denial of a pretrial motion to dismiss an indictment on speedy trial grounds was not appealable under the collateral-order doctrine. The Court noted that speedy trial claims necessitated a careful assessment of the particular facts of the case, and that "[t]he denial of a pretrial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial—when prejudice can be better gauged—would also be denied."

It is not at all clear to me, nor has it been to courts considering the question, that an order denying a motion for disqualification of counsel conclusively determines the disputed question. The District Court remains free to reconsider its decision at any time. See *Armstrong* v. *McAlpin*, 625 F. 2d 433, 439 (CA2 1980) (en banc), cert. pending, No. 80–431; *id.*, at 451 (Van Graafeiland, J., concurring in part and dissenting in part); *Fleischer* v. *Phillips*, 264 F. 2d 515, 516–517 (CA2), cert. denied, 359 U. S. 1002 (1959). The Court itself recognizes this possibility, *ante*, at 378–379, n. 13. And in doing so the Court is not only being abstractly inconsistent with its conclusion that the first prong of the *Cohen* test is satisfied. In this very case the possibility of reconsideration by the trial judge cannot be dismissed as merely theoretical. Petitioner's claim is that respondent will advance only those theories of liability which absolve the insurer, or will advance those theories more strenuously than others. Although it is impossible to discern if this is true before trial, the issues may become clearer as trial progresses and respondent actually does present his theories. As in *MacDonald*, it cannot be assumed that a motion made at a

later point in the proceedings—"when prejudice can be better gauged"—will be denied.

Because of what seem to me to be totally unnecessary and very probably incorrect statements as to this minor point in the opinion, I concur in the result only.

Syllabus

UPJOHN CO. ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-886. Argued November 5, 1980—Decided January 13, 1981

When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U. S. C. § 7602 demanding production of, *inter alia*, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, *inter alia*, that the attorney-client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work-product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the attorney-client privilege, but held that under the so-called "control group test" the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" The court also held that the work-product doctrine did not apply to IRS summonses.

Held:

1. The communications by petitioner's employees to counsel are covered by the attorney-client privilege insofar as the responses to the

questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 389–397.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Pp. 390–392.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 392.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. Pp. 392–393.

(d) Here, the communications at issue were made by petitioner's employees to counsel for petitioner acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Pp. 394–395.

2. The work-product doctrine applies to IRS summonses. Pp. 397–402.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language

or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work-product doctrine. P. 398.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and *Hickman* v. *Taylor*, 329 U. S. 495, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 401.

600 F. 2d 1223, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and III of which BURGER, C. J., joined. BURGER, C. J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 402.

Daniel M. Gribbon argued the cause and filed briefs for petitioners.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were *Solicitor General McCree, Assistant Attorney General Ferguson, Stuart A. Smith,* and *Robert E. Lindsay.**

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*Briefs of *amici curiae* urging reversal were filed by *Leonard S. Janofsky, Leon Jaworski,* and *Keith A. Jones* for the American Bar Association; by *Thomas G. Lilly, Alfred F. Belcuore, Paul F. Rothstein,* and *Ronald L. Carlson* for the Federal Bar Association; by *Erwin N. Griswold* for the American College of Trial Lawyers et al.; by *Stanley T. Kaleczyc* and *J. Bruce Brown* for the Chamber of Commerce of the United States; and by *Lewis A. Kaplan, James N. Benedict, Brian D. Forrow, John G. Koeltl, Standish Forde Medina, Jr., Renee J. Roberts,* and *Marvin Wexler* for the Committee on Federal Courts et al.

William W. Becker filed a brief for the New England Legal Foundation as *amicus curiae.*

JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U. S. 925. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants so informed petitioner Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter

began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8–K disclosing certain questionable payments.[1] A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U. S. C. § 7602 demanding production of:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political

[1] On July 28, 1976, the company filed an amendment to this report disclosing further payments.

contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a–18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U. S. C. §§ 7402 (b) and 7604 (a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F. 2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'" *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was

within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U. S. C. § 7602." *Id.*, at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel* v. *United States*, 445 U. S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher* v. *United States*, 425 U. S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt* v. *Blackburn*, 128 U. S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the

law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation, *United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318, 336 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." 600 F. 2d, at 1226. The first case to articulate the so-called "control group test" adopted by the court below, *Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied *sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F. 2d 742 (CA3 1962), cert. denied, 372 U. S. 943 (1963), reflected a similar conceptual approach:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, *he is* (*or personifies*) *the corporation* when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See *Trammel*, *supra*, at 51; *Fisher*, *supra*, at 403. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts

with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4–1:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also *Hickman* v. *Taylor*, 329 U. S. 495, 511 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"—who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc.* v. *Meredith*, 572 F. 2d 596 (CA8 1978) (en banc):

> "In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice". If he interviews employees not having "the very highest au-

> thority", their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with "the very highest authority", he may find it extremely difficult, if not impossible, to determine what happened.'" *Id.*, at 608–609 (quoting Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege, 12 B. C. Ind. & Com. L. Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, *e. g.*, *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (SC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, *e. g.*, *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 440–441 (1978) ("the behavior proscribed by the [Sherman] Act is

often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct").[2] The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, *e. g., Hogan* v. *Zletz,* 43 F. R. D. 308, 315–316 (ND Okla. 1967), aff'd in part *sub nom. Natta* v. *Hogan,* 392 F. 2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with *Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F. R. D. 82, 83–85 (ED Pa. 1969), aff'd, 478 F. 2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

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[2] The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

The communications at issue were made by Upjohn employees [3] to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments.*" (Emphasis supplied.) 78–1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas.[4] The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investiga-

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[3] Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a–38a. Petitioners argue that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

[4] See *id.*, at 26a–27a, 103a, 123a–124a. See also *In re Grand Jury Investigation*, 599 F. 2d 1224, 1229 (CA3 1979); *In re Grand Jury Subpoena*, 599 F. 2d 504, 511 (CA2 1979).

tion." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." *Id.*, at 165a–166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.*, at 39a, 43a, and have been kept confidential by the company.[5] Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely differ-

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[5] See Magistrate's opinion, 78–1 USTC ¶ 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."

> ent thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia* v. *Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (ED Pa. 1962).

See also *Diversified Industries*, 572 F. 2d, at 611; *State ex rel. Dudek* v. *Circuit Court*, 34 Wis. 2d 559, 580, 150 N. W. 2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman* v. *Taylor*, 329 U. S., at 516: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93–1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"); *Trammel*, 445 U. S., at 47; *United States* v. *Gillock*, 445 U. S. 360, 367 (1980). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attor-

ney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a–28a, 91a–93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U. S. C. § 7602.[6]

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in *Hickman* v. *Taylor*, 329 U. S. 495 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510. The Court noted that "it is essential that a lawyer work with

[6] The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them. See n. 3, *supra*.

a certain degree of privacy" and reasoned that if discovery of the material sought were permitted

> "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511.

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in *United States* v. *Nobles*, 422 U. S. 225, 236–240 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26 (b)(3).[7]

As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States* v. *Euge*, 444 U. S. 707, 714 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26 (b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable

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[7] This provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

to summons enforcement proceedings by Rule 81 (a)(3). See *Donaldson* v. *United States*, 400 U. S. 517, 528 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78–1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in *Hickman:*

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U. S., at 511.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman*, however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." *Id.*, at 512. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type." *Id.*, at 512–513. See also *Nobles, supra*, at 252–253 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U. S., at 513 ("what he saw fit to write down regarding witnesses' remarks"); *id.*, at 516–517 ("the statement would be his [the

attorney's] language, permeated with his inferences") (Jackson, J., concurring).[8]

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78–1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U. S. C. App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

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[8] Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." 78–1 USTC ¶ 9277, p. 83,599.

Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, *e. g., In re Grand Jury Proceedings,* 473 F. 2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); *In re Grand Jury Investigation,* 412 F. Supp. 943, 949 (ED Pa. 1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, *e. g., In re Grand Jury Investigation,* 599 F. 2d 1224, 1231 (CA3 1979) ("special considerations . . . must shape any ruling on the discoverability of interview memoranda . . . ; such documents will be discoverable only in a 'rare situation' "); cf. *In re Grand Jury Subpoena,* 599 F. 2d 504, 511–512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26 (b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we

think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ante*, at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See *ante*, at 394–395. Because of the great importance of the issue, in my view the Court should make clear now that, as a

general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, *e. g., Diversified Industries, Inc.* v. *Meredith*, 572 F. 2d 596, 609 (CA8 1978) (en banc); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F. 2d 487, 491–492 (CA7 1970), aff'd by an equally divided Court, 400 U. S. 348 (1971); *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1163–1165 (SC 1974). Other communications between employees and corporate counsel may indeed be privileged—as the petitioners and several *amici* have suggested in their proposed formulations*—but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly

*See Brief for Petitioners 21–23, and n. 25; Brief for American Bar Association as *Amicus Curiae* 5–6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as *Amici Curiae* 9–10, and n. 5.

before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," *ante*, at 396, neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

MARISCAL *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-5618. Decided January 19, 1981

Held: The Court of Appeals' judgment affirming, on the basis of the "concurrent sentence" doctrine, petitioner's mail fraud convictions—the court having also affirmed, on the merits, his convictions for another offense—is vacated, and the case is remanded for reconsideration of the applicability of the "concurrent sentence" doctrine, since the Solicitor General conceded in this Court that the mail fraud convictions were invalid.

Certiorari granted; 626 F. 2d 868, vacated in part and remanded.

PER CURIAM.

This case arises on a petition for certiorari to the United States Court of Appeals for the Ninth Circuit, which affirmed petitioner's conviction on 10 counts of interstate transportation of property obtained by fraud, in violation of 18 U. S. C. § 2314, and on 12 counts of mail fraud, in violation of 18 U. S. C. § 1341. 626 F. 2d 868. The court affirmed the interstate transportation convictions on the merits, and declined to address the "rather complex issues" presented by the mail fraud convictions, invoking the discretionary "concurrent sentence" doctrine. App. to Pet. for Cert. 6–7; see *Barnes* v. *United States*, 412 U. S. 837, 848, n. 16 (1973); *Benton* v. *Maryland*, 395 U. S. 784, 787–793 (1969). In light of the Solicitor General's concession in this Court that the mail fraud convictions were invalid, Memorandum in Opposition 4–5, we grant the motion of petitioner for leave to proceed *in forma pauperis*, grant certiorari, vacate the judgment of the Ninth Circuit affirming the mail fraud convictions, and remand for reconsideration of the applicability of the "concurrent sen-

tence" doctrine to a conviction conceded by the United States to be erroneous.

It is so ordered.

JUSTICE WHITE dissents, essentially for the reasons stated by JUSTICE REHNQUIST in his dissenting opinion.

JUSTICE REHNQUIST, dissenting.

There is a certain irony in the fact that I authored for the Court the opinion in *United States* v. *Maze,* 414 U. S. 395 (1974), which affirmed an opinion written by the present Solicitor General when he was a judge for the Court of Appeals for the Sixth Circuit reversing certain mail fraud convictions. Nonetheless, I think that a more important principle is at stake here than whether or not the mail fraud convictions are proper. That larger issue is whether this Court should mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error, and vacate the conviction and request that the Government present its "confession of error" to the Court of Appeals which it had earlier persuaded to affirm the conviction.

One may freely concede that with 93 United States Attorneys and 11 Courts of Appeals, there will be differing views as between prosecutors, as well as between prosecutors and courts, as to legal issues presented in criminal cases. But the Executive *is* one branch of the Government, and the Judiciary another. The Office of the Solicitor General, while having earned over the years a reputation for ability and expertise in presenting the Government's claims to this Court, is nonetheless a part of the Executive Branch of the Federal Government, not of the Judicial Branch. I think it ill behooves this Court to defer to the Solicitor General's suggestion that a Court of Appeals may have been in error after another representative of the Executive Branch and the Justice De-

partment has persuaded the Court of Appeals to reach the result which it did.

The Office of the Solicitor General may be quite faithfully performing its obligations under our system by calling our attention to what it perceives to be errors in the decisions of the courts of appeals. But I harbor serious doubt that our adversary system of justice is well served by this Court's practice of routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own. With the increasing caseloads of all federal courts, there is a natural temptation to "pass the buck" to some other court if that is possible. Congress has given us discretionary jurisdiction to deny certiorari if we do not wish to grant plenary consideration to a particular case, a benefit that other federal courts do not share, but it has not to my knowledge moved the Office of the Solicitor General from the Executive Branch of the Federal Government to the Judicial Branch. Until it does, I think we are bound by our oaths either to examine independently the merits of a question presented for review on certiorari, or in the exercise of our discretion to deny certiorari. Because the Court exercises neither of these alternatives here, I dissent.

UNITED STATES *v.* CALIFORNIA

ON BILL IN EQUITY

No. 5, Orig. Decided June 23, 1947, May 17, 1965, May 15, 1978, and June 9, 1980—Order and decree entered October 27, 1947—Supplemental decree entered January 31, 1966—Second supplemental decree entered June 13, 1977—Third supplemental decree entered November 27, 1978—Fourth supplemental decree entered January 19, 1981

Fourth supplemental decree is entered.

Opinions reported: 332 U. S. 19, 381 U. S. 139, 436 U. S. 32, 447 U. S. 1; order and decree reported: 332 U. S. 804; supplemental decree reported: 382 U. S. 448; second supplemental decree reported: 432 U. S. 40; third supplemental decree reported: 439 U. S. 30.

FOURTH SUPPLEMENTAL DECREE

IT IS ORDERED, ADJUDGED, AND DECREED that the Decree of October 27, 1947 (332 U. S. 804), and the Supplemental Decrees heretofore entered in this cause on January 31, 1966 (382 U. S. 448), June 13, 1977 (432 U. S. 40), and November 27, 1978 (439 U. S. 30), be, and the same hereby are further supplemented as follows:

1. The inland waters of the Port of San Pedro include those waters enclosed by a straight line from the eastern end of the Long Beach breakwater (NOS Chart 18749, 33°43′23″ N., 118°08′10″ W.) to the seaward end of the east jetty of Anaheim Bay (NOS Chart 18749, 33°43′36″ N., 118°05′57″ W.).

2. The inland waters of San Diego Bay are those enclosed by a straight line from the seaward end of Point Loma (NOS Chart 18772, 32°39′46″ N., 117°14′29″ W.) to the point at which the line of mean lower low water intersects with the southern seaward end of the entire Zuniga jetty (NOS Chart 18772, 32°40′00.5″ N., 117°13′19″ W.).

3. The following artificial structures do not form part of the coastline of California for purposes of establishing the

federal-state boundary line under the Submerged Lands Act, 43 U. S. C. § 1301 *et seq.*:

a. The Sharp Beach pier (NOS Chart 18685, 37°38′00″ N., 122°29′41″ W.);
b. The Morro Strand pier (NOS Chart 18703, 35°24′-38.4″ N., 120°52′31.9″ W.);
c. The Port Orford pier (NOS Chart 18721, 34°28′09.6″ N., 120°13′38.8″ W.);
d. The Ellwood pier (NOS Chart 18721, 34°25′39″ N., 119°55′20″ W.);
e. The Santa Barbara Biltmore Hotel pier (NOS Chart 18725, 34°24′59.4″ N., 119°38′30″ W.);
f. The Carpinteria pier (NOS Chart 18725, 34°23′06″ N., 119°30′4.6″ W.);
g. The Punta Gorda causeway and Rincon Island (NOS Chart 18725, 34°20′48.1″ N., 119°26′39″ W.);
h. The Venice pier (NOS Chart 18744, 30°59′06″ N., 118°28′35″ W.);
i. The Manhattan Beach pier (NOS Chart 18744, 33°-53′00″ N., 118°24′48.2″ W.);
j. The Hermosa Beach pier (NOS Chart 18744, 33°51′-40.2″ N., 118°24′16.9″ W.);
k. The Huntington Beach pier (NOS Chart 18740, 33°-09′14″ N., 118°00′21″ W.);
l. The Newport Beach pier (NOS Chart 18754, 33°36′-22.0″ N., 117°55′49.6″ W.);
m. The Balboa Beach pier (NOS Chart 18754, 33°35′54.4″ N., 117°54′01.1″ W.);
n. The Oceanside pier (NOS Chart 18740, 33°11′29.4″ N., 117°23′18″ W.);
o. The Ocean Beach pier (NOS Chart 18754, 32°44′-58.5″ N., 117°15′30.5″ W.); and
p. The Imperial Beach pier (NOS Chart 18772, 32°34′-46.6″ N., 117°08′08.0″ W.).

4. The parties having paid their own costs and having contributed equally to a fund for expenses of the Special Master, any amounts remaining in said fund after deduction of all expenses by the Special Master shall be divided equally and returned to each party by the Special Master.

5. The Court retains jurisdiction to entertain further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree or to effectuate the rights of the parties in the premises.

JUSTICE MARSHALL took no part in the consideration or decision of this order.

Syllabus

UNITED STATES *v.* CORTEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–404. Argued December 1, 1980—Decided January 21, 1981

Based on their discovery of sets of distinctive human footprints in the desert, Border Patrol officers deduced that on a number of occasions groups of from 8 to 20 persons had been guided by a person, whom they designated "Chevron," from Mexico across an area of desert in Arizona, known to be heavily trafficked by aliens illegally entering the country. These groups of aliens proceeded to an isolated point on a road to be picked up by a vehicle; the officers deduced the vehicle probably approached from the east and returned to the east after the pickup. They also surmised, based on the times when the distinctive tracks were discovered, that "Chevron" generally traveled on clear nights during or near weekends, and arrived at the pickup point between 2 a. m. and 6 a. m. On the basis of this information, the officers stationed themselves at a point east of the probable pickup point on a night when they believed there was a strong possibility that "Chevron" would be smuggling aliens. The officers observed a pickup truck with a camper shell suitable for carrying sizable groups pass them heading west and then observed the same vehicle return within the estimated time for making a round trip to the pickup point. The officers stopped the vehicle, which was being driven by respondent Cortez and in which respondent Hernandez-Loera, who was wearing shoes with soles matching the distinctive "chevron" shoeprint, was a passenger. Cortez voluntarily opened the door of the camper and the officers then discovered illegal aliens. Prior to trial on charges of transporting illegal aliens, respondents sought to suppress the evidence of the presence of the aliens discovered as a result of the stopping of their vehicle, contending that the officers did not have adequate cause to make the investigative stop. The District Court denied the motion, and respondents were convicted. The Court of Appeals reversed, holding that the officers lacked a sufficient basis to justify stopping the vehicle and thus respondents' Fourth Amendment rights were violated.

Held: The objective facts and circumstantial evidence justified the investigative stop of respondents' vehicle. Pp. 417–422.

(a) In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining

officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. The process of assessing all of the circumstances does not deal with hard certainties, but with probabilities, and the evidence collected must be weighed as understood by those versed in the field of law enforcement. Also, the process must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Pp. 417–418.

(b) This case implicates all of these principles—especially the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, allow for permissible deductions from such facts to afford a legitimate basis for suspicion of a particular person and action on that suspicion. Pp. 418–421.

(c) The intrusion upon privacy associated with this stop was limited and "reasonably related in scope to the justification for [its] initiation." *Terry* v. *Ohio*, 392 U. S. 1, 29. Based upon the whole picture, the officers, as experienced Border Patrol agents, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity. Pp. 421–422.

595 F. 2d 505, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in the result, *post*, p. 422. MARSHALL, J., concurred in the judgment.

Barbara E. Etkind argued the cause for the United States. With her on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey, William G. Otis,* and *John C. Winkfield.*

S. Jeffrey Minker argued the cause and filed a brief for respondent Cortez.

Bernardo P. Velasco argued the cause for respondent Hernandez-Loera. With him on the brief was *Thomas W. O'Toole.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 447 U. S. 904, to consider whether objective facts and circumstantial evidence suggesting that a particular vehicle is involved in criminal activity may pro-

vide a sufficient basis to justify an investigative stop of that vehicle.

I

Late in 1976, Border Patrol officers patrolling a sparsely populated section of southern central Arizona found human footprints in the desert. In time, other sets of similar footprints were discovered in the same area. From these sets of footprints, it was deduced that, on a number of occasions, groups of from 8 to 20 persons had walked north from the Mexican border, across 30 miles of desert and mountains, over a fairly well-defined path, to an isolated point on Highway 86, an east-west road running roughly parallel to the Mexican border.

Officers observed that one recurring shoeprint bore a distinctive and repetitive V-shaped or chevron design. Because the officers knew from recorded experience that the area through which the groups passed was heavily trafficked by aliens illegally entering the country from Mexico, they surmised that a person, to whom they gave the case-name "Chevron," was guiding aliens illegally into the United States over the path marked by the tracks to a point where they could be picked up by a vehicle.

The tracks led into or over obstacles that would have been avoided in daylight. From this, the officers deduced that "Chevron" probably led his groups across the border and to the pickup point at night. Moreover, based upon the times when they had discovered the distinctive sets of tracks, they concluded that "Chevron" generally traveled during or near weekends and on nights when the weather was clear.

Their tracking disclosed that when "Chevron's" groups came within 50 to 75 yards of Highway 86, they turned right and walked eastward, parallel to the road. Then, approximately at highway milepost 122, the tracks would turn north and disappear at the road. From this pattern, the officers concluded that the aliens very likely were picked up by a ve-

hicle—probably one approaching from the east, for after a long overland march the group was most likely to walk parallel to the highway *toward* the approaching vehicle. The officers also concluded that, after the pickup, the vehicle probably returned to the east, because it was unlikely that the group would be walking away from its ultimate destination.

On the Sunday night of January 30–31, 1977, Officers Gray and Evans, two Border Patrolmen who had been pursuing the investigation of "Chevron," were on duty in the Casa Grande area. The latest set of observed "Chevron" tracks had been made on Saturday night, January 15–16. January 30–31 was the first clear night after three days of rain. For these reasons, Gray and Evans decided there was a strong possibility that "Chevron" would lead aliens from the border to the highway that night.

The officers assumed that, if "Chevron" did conduct a group that night, he would not leave Mexico until after dark, that is, about 6 p. m. They knew from their experience that groups of this sort, traveling on foot, cover about two and a half to three miles an hour. Thus, the 30-mile journey would take from 8 to 12 hours. From this, the officers calculated that "Chevron" and his group would arrive at Highway 86 somewhere between 2 a. m. and 6 a. m. on January 31.

About 1 a. m., Gray and Evans parked their patrol car on an elevated location about 100 feet off Highway 86 at milepost 149, a point some 27 miles east of milepost 122. From their vantage point, the officers could observe the Altar Valley, an adjoining territory they had been assigned to watch that night, and they also could see vehicles passing on Highway 86. They estimated that it would take approximately one hour and a half for a vehicle to make a round trip from their vantage point to milepost 122. Working on the hypothesis that the pickup vehicle approached milepost 122 from the east and thereafter returned to its starting point, they focused upon vehicles that passed them from the east

and, after about one hour and a half, passed them returning to the east.

Because "Chevron" appeared to lead groups of between 8 and 20 aliens at a time, the officers deduced that the pickup vehicle would be one that was capable of carrying that large a group without arousing suspicion. For this reason, and because they knew that certain types of vehicles were commonly used for smuggling sizable groups of aliens, they decided to limit their attention to vans, pickup trucks, other small trucks, campers, motor homes, and similar vehicles.

Traffic on Highway 86 at milepost 149 was normal on the night of the officers' surveillance. In the 5-hour period between 1 a. m. and 6 a. m., 15 to 20 vehicles passed the officers heading west, toward milepost 122. Only two of them—both pickup trucks with camper shells—were of the kind that the officers had concluded "Chevron" would likely use if he was to carry aliens that night. One, a distinctively colored pickup truck with a camper shell, passed for the first time at 4:30 a. m. Officer Gray was able to see and record only a partial license number, "GN 88—."[1] At 6:12 a. m., almost exactly the estimated one hour and a half later, a vehicle looking like this same pickup passed them again, this time heading east.

The officers followed the pickup and were satisfied from its license plate, "GN 8804," that it was the same vehicle that had passed at 4:30 a. m. At that point, they flashed their police lights and intercepted the vehicle. Respondent Jesus Cortez was the driver and owner of the pickup; respondent Pedro Hernandez-Loera was sitting in the passenger's seat. Hernandez-Loera was wearing shoes with soles matching the distinctive "chevron" shoeprint.

The officers identified themselves and told Cortez they were conducting an immigration check. They asked if he was

[1] The second camper passed them 15 or 20 minutes later. As far as the record shows, it did not return.

carrying any passengers in the camper. Cortez told them he had picked up some hitchhikers, and he proceeded to open the back of the camper. In the camper, there were six illegal aliens. The officers then arrested the respondents.

Cortez and Hernandez-Loera were charged with six counts of transporting illegal aliens in violation of 8 U. S. C. § 1324 (a). By pretrial motion, they sought to suppress the evidence obtained by Officers Gray and Evans as a result of stopping their vehicle. They argued that the officers did not have adequate cause to make the investigative stop. The District Court denied the motion. A jury found the respondents guilty as charged. They were sentenced to concurrent prison terms of five years on each of six counts. In addition, Hernandez-Loera was fined $12,000.

A divided panel of the Court of Appeals for the Ninth Circuit reversed, holding that the officers lacked a sufficient basis to justify the stop of the pickup. 595 F. 2d 505 (1979). That court recognized that *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), provides a standard governing investigative stops of the kind involved in this case, stating:

> "The quantum of cause necessary in . . . cases [like this one] was established . . . in *United States* v. *Brignoni-Ponce* . . . . '[O]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.'" 595 F. 2d, at 507 (quoting *United States* v. *Brignoni-Ponce*, *supra*, at 884) (citations omitted).

The court also recognized that "the ultimate question on appeal is whether the trial judge's finding that founded suspicion was present here was clearly erroneous." 595 F. 2d, at 507. Here, because, in the view of the facts of the two judges constituting the majority, "[t]he officers did not have a valid basis for singling out the Cortez vehicle," *id.*, at 508, and be-

cause the circumstances admitted "far too many innocent inferences to make the officers' suspicions reasonably warranted," *ibid.*, the panel concluded that the stop of Cortez' vehicle was a violation of the respondents' rights under the Fourth Amendment. In dissent, Judge Chambers was persuaded that *Brignoni-Ponce* recognized the validity of permitting an officer to assess the facts in light of his past experience.

II

A

The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of the vehicle here. *Reid* v. *Georgia*, 448 U. S. 438, 440 (1980); *United States* v. *Brignoni-Ponce*, *supra*, at 878; *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Terry* v. *Ohio*, 392 U. S. 1, 16–19 (1968). An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.[2] *Brown* v. *Texas*, 443 U. S. 47, 51 (1979); *Delaware* v. *Prouse*, 440 U. S. 648, 661 (1979); *United States* v. *Brignoni-Ponce*, *supra*, at 884; *Adams* v. *Williams*, 407 U. S. 143, 146–149 (1972); *Terry* v. *Ohio*, *supra*, at 16–19.

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal

[2] Of course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct.

activity. See, *e. g.*, *Brown* v. *Texas*, *supra*, at 51; *United States* v. *Brignoni-Ponce*, *supra*, at 884.

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain commonsense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry* v. *Ohio*, *supra*, said that "[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*" *Id.*, at 21, n. 18 (emphasis added). See also *Brown* v. *Texas*, *supra*, at 51; *Delaware* v. *Prouse*, *supra*, at 661–663; *United States* v. *Brignoni-Ponce*, *supra*, at 884.

B

This case portrays at once both the enormous difficulties of patrolling a 2,000-mile open border and the patient skills

needed by those charged with halting illegal entry into this country. It implicates all of the principles just discussed—especially the imperative of recognizing that, when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion. We see here the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement. Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on "Chevron."

Of critical importance, the officers knew that the area was a crossing point for illegal aliens. They knew that it was common practice for persons to lead aliens through the desert from the border to Highway 86, where they could—by prearrangement—be picked up by a vehicle. Moreover, based upon clues they had discovered in the 2-month period prior to the events at issue here, they believed that one such guide, whom they designated "Chevron," had a particular pattern of operations.

By piecing together the information at their disposal, the officers tentatively concluded that there was a reasonable likelinood that "Chevron" would attempt to lead a group of aliens on the night of Sunday, January 30–31. Someone with chevron-soled shoes had led several groups of aliens in the previous two months, yet it had been two weeks since the latest crossing. "Chevron," they deduced, was therefore due reasonably soon. "Chevron" tended to travel on clear weekend nights. Because it had rained on the Friday and Saturday nights of the weekend involved here, Sunday was the only clear night of that weekend; the officers surmised it was therefore a likely night for a trip.

Once they had focused on that night, the officers drew upon other objective facts known to them to deduce a time frame

within which "Chevron" and the aliens were likely to arrive. From what they knew of the practice of those who smuggle aliens, including what they knew of "Chevron's" previous activities, they deduced that the border crossing and journey through the desert would probably be at night. They knew the time when sunset would occur at the point of the border crossing; they knew about how long the trip would take. They were thus able to deduce that "Chevron" would likely arrive at the pickup point on Highway 86 in the time frame between 2 a. m. and 6 a. m.

From objective facts, the officers also deduced the probable point on the highway—milepost 122—at which "Chevron" would likely rendezvous with a pickup vehicle. They deduced from the direction taken by the sets of "Chevron" footprints they had earlier discovered that the pickup vehicle would approach the aliens from, and return with them to, a point east of milepost 122. They therefore staked out a position east of milepost 122 (at milepost 149) and watched for vehicles that passed them going west and then, approximately one and a half hours later, passed them again, this time going east.

From what they had observed about the previous groups guided by the person with "chevron" shoes, they deduced that "Chevron" would lead a group of 8 to 20 aliens. They therefore focused their attention on enclosed vehicles of that passenger capacity.

The analysis produced by Officers Gray and Evans can be summarized as follows: if, on the night upon which they believed "Chevron" was likely to travel, sometime between 2 a. m. and 6 a. m., a large enclosed vehicle was seen to make an east-west-east round trip to and from a deserted point (milepost 122) on a deserted road (Highway 86), the officers would stop the vehicle on the return trip. In a 4-hour period the officers observed only one vehicle meeting that description. And it is not surprising that when they stopped the

vehicle on its return trip it contained "Chevron" and several illegal aliens.[3]

C

The limited purpose of the stop in this case was to question the occupants of the vehicle about their citizenship and immigration status and the reasons for the round trip in a short timespan in a virtually deserted area. No search of the camper or any of its occupants occurred until after respondent Cortez voluntarily opened the back door of the camper; thus, only the stop, not the search is at issue here. The intrusion upon privacy associated with this stop was limited and was "reasonably related in scope to the justification for [its] initiation," *Terry* v. *Ohio*, 392 U. S., at 29.

We have recently held that stops by the Border Patrol may be justified under circumstances less than those constituting probable cause for arrest or search. *United States* v. *Brignoni-Ponce*, 422 U. S., at 880.[4] Thus, the test is not whether Officers Gray and Evans had probable cause to conclude that the vehicle they stopped would contain "Chevron" and a group of illegal aliens. Rather the question is whether, based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle

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[3] In *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 884–885 (1975), the Court listed several factors to be considered as part of the totality of the circumstances in determining the existence *vel non* of a particularized suspicion in cases treating official attempts to stem the influx of illegal aliens into our country. Though the list did not purport to be exhaustive, it is noteworthy that several of the factors present here were recognized by *Brignoni-Ponce* as significant in this context; for example, information about recent border crossings and the type of vehicle involved.

[4] The wide public interest in effective measures to prevent the entry of illegal aliens at the Mexican border has been cataloged by this Court. See, *e. g.*, *United States* v. *Ortiz*, 422 U. S. 891, 899–914 (1975) (BURGER, C. J., concurring in judgment); *United States* v. *Brignoni-Ponce*, *supra*, at 878–879.

they stopped was engaged in criminal activity. On this record, they could so conclude.

Reversed.

JUSTICE MARSHALL concurs in the judgment.

JUSTICE STEWART, concurring in the result.

The Border Patrol officers in this case knew, or had rationally deduced, that "Chevron" had repeatedly shepherded illegal aliens up from the border; that his treks had commonly ended early in the morning around milepost 122 on Highway 86; that he usually worked on weekends; that he probably had made no trips for two weeks; and that trips were most likely when the weather was good. Knowing of this pattern, the officers could reasonably anticipate, even if they could not guarantee, the arrival of another group of aliens, led by Chevron, at milepost 122 on the first clear weekend night in late January 1977. Route 86 leads through almost uninhabited country, so little traveled in the hours of darkness that only 15 to 20 westbound vehicles passed the police during the five hours they watched that Sunday night. Only two vehicles capacious enough to carry a sizable group of illegal aliens went by. One of those two vehicles not only drove past them, but returned in the opposite direction after just enough time had elapsed for a journey to milepost 122 and back. This nocturnal round trip into "desolate desert terrain" would in any event have been puzzling. Coming when and as it did, surely the most likely explanation for it was that Chevron was again shepherding aliens.

In sum, the Border Patrol officers had discovered an abundance of "specific articulable facts" which, "together with rational inferences from [them]," entirely warranted a "suspicion that the vehicl[e] contain[ed] aliens who [might] be illegally in the country." *United States* v. *Brignoni-Ponce,*

422 U. S. 873, 884. Because the information possessed by the officers thus met the requirements established by the *Brignoni-Ponce* case for the kind of stop made here, I concur in the reversal of the judgment of the Court of Appeals.

RUBIN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-1013. Argued November 12, 1980—Decided January 21, 1981

Section 17 (a) of the Securities Act of 1933 prohibits fraud in the "offer or sale" of any securities. Section 2 (3) of the Act defines "sale" as including "every . . . disposition of a security or interest in a security, for value," and "offer" as including "every attempt or offer to dispose of . . . a security or interest in a security, for value." Petitioner was convicted of conspiracy to violate § 17 (a) by making false representations to a bank concerning shares of stock pledged as collateral for loans. The Court of Appeals affirmed, rejecting petitioner's contention that the stock pledges did not constitute "offers" or "sales" under § 17 (a).

Held: The pledge of stock to a bank as collateral for a loan is an "offer or sale" of a security under § 17 (a). Pp. 428–431.

(a) Obtaining a loan secured by a pledge of stock unmistakably involves a "disposition of [an] interest in a security, for value" within the statutory definition. Although pledges transfer less than absolute title, the interest thus transferred nonetheless is an "interest in a security," and it is not essential under the terms of the Act that full title pass to a transferee for the transaction to be an "offer" or "sale." Pp. 429–430.

(b) When the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances; no such circumstances are present here. Treating pledges as included among "offers" and "sales" comports with the Act's purpose and, specifically, with § 17 (a)'s purpose to protect against fraud and promote the free flow of information in the public dissemination of securities. The economic considerations and realities present when a lender parts with value and accepts securities as collateral for a loan are similar in important respects to the risk an investor undertakes when purchasing securities. Both rely on the value of the securities themselves, and both must be able to depend on the transferor's representations, regardless of whether the transferor passes full title or only a conditional and defeasible interest to secure repayment of a loan. Pp. 430–431.

609 F. 2d 51, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 431.

Louis Bender argued the cause for petitioner. With him on the brief was *Sandor Frankel.*

Stephen M. Shapiro argued the cause for the United States. With him on the brief were *Solicitor General McCree, Sara Criscitelli, Ralph C. Ferrara, Jacob H. Stillman,* and *Elisse B. Walter.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether a pledge of stock to a bank as collateral for a loan is an "offer or sale" of a security under § 17 (a) of the Securities Act of 1933, 15 U. S. C. § 77q (a).

I

Late in 1972, petitioner became vice president of Tri-State Energy, Inc., a corporation holding itself out as involved in energy exploration and production. At the time, Tri-State was experiencing serious financial problems. Petitioner approached Bankers Trust Co., a bank with which he had frequently dealt while he had been affiliated with an accounting firm. Bankers Trust initially refused a $5 million loan to Tri-State for operating a mine. Nevertheless, it lent Tri-State $50,000 on October 20, 1972, for 30 days with the understanding that if Tri-State could produce adequate financial information and sufficient collateral, additional financing might be available.

Petitioner assisted other officers of Tri-State in preparing a financial statement for submission to the bank. The balance sheet, which listed a net worth of $7.1 million, was false

**Darrel E. Reed, Jr.,* and *Richard K. Willard* filed a brief for Bossier Bank & Trust Co. as *amicus curiae* urging reversal.

and misleading in several respects.[1] Tri-State also submitted inflated projections of future earnings based in large measure on sham contracts and forged documentation. Subsequently, petitioner personally paid the loan officer $4,000 and another official $1,000 as inducements for further loans. Tri-State borrowed an additional $425,000 over a brief period.[2] Ultimately, the loans were consolidated into a single demand note for $475,000, dated February 26, 1973.

Bankers Trust required collateral for each new loan; between October 20, 1972, and January 19, 1973, Tri-State pledged stock in six companies. The stocks were represented as being good, marketable, and unrestricted and valued at a total of approximately $1.7 million;[3] in fact, they were practically worthless. Many shares were issued by "shell" companies. Most were simply "rented"—*i. e.*, borrowed from the owner for a fee—to show to the bank or were otherwise restricted. In one instance, petitioner arranged for fictitious quotations to appear in a service reporting over-the-counter transactions and used by the bank in evaluating pledged

[1] The balance sheet listed an account receivable of $7.5 million and included a copy of a contract that purportedly formed the basis of this account. No such item existed, and the signature on the contract had been forged. Evidence also indicated that Tri-State had listed a fictitious tax liability to offset the fictitious asset. The statement also referred to over $264,000 cash on hand and coal worth $180,000. Both figures were exaggerated.

[2] Subsequent loans were made on November 22 ($50,000), November 30 ($100,000), and December 6 ($275,000).

[3] The pledges were 400,000 shares of American Leisure Corp. (October 20—shell company; shares restricted); 2,000 shares of All States Life Insurance Co. (November 10—nonmarketable; "rented" to show the bank but not owned by Tri-State); 20,000 shares of Marlin Investment Co. (November 22—"rented" from a person who was told they would not be used as collateral); 100,000 shares of Management Dynamics, Inc. (December 6—trading suspended; withdrawn as collateral); 175,000 shares of General Investment Corp. (December 19—restricted); 50,000 shares of Satellite Systems Corp. (January 19—restricted and "rented"; fictitious overseas advertisement planted).

securities; in another, Tri-State planted, through others, a fictitious advertisement in an overseas newspaper and showed it to the bank, representing it to be a quotation. Trading of one issue was suspended shortly after the pledge when the issuing company could not account for 900,000 shares of its stock; Tri-State replaced this collateral before Bankers Trust learned of the difficulty. Petitioner acted as Tri-State's agent for most of these transactions.

A Justice Department request for information about Tri-State received February 28, two days after the consolidated note was signed, prompted Bankers Trust on March 5 to demand payment in full within three days. No payment of this demand was made, and in May another officer of Tri-State met with bank officials and tried to forestall foreclosure. After rejecting Tri-State's request for a further loan, the bank sued on the note.

Bankers Trust also proceeded against petitioner personally as a guarantor of the loans. Petitioner signed a confession of judgment against himself in the amount of the unpaid loans, plus accrued interest, but thereafter filed a petition for bankruptcy. The bank recovered only about $2,500, plus interest and expenses, on its $475,000 loan.

Petitioner was indicted on three counts of violating and conspiring to violate various federal antifraud statutes, including § 17 (a) of the Securities Act of 1933, 15 U. S. C. § 77q (a).[4] Following a jury trial in the United States Dis-

[4] Count 1 of the indictment charged petitioner and his codefendants with conspiring to violate 18 U. S. C. § 1014 (fraud in a bank loan application), 18 U. S. C. § 1341 (mail fraud), and 18 U. S. C. § 1343 (wire fraud), as well as § 17 (a) (securities fraud). Counts 2 and 3 alleged substantive violations of § 17 (a) and 18 U. S. C. § 1014, respectively, against petitioner and some of the codefendants listed in the conspiracy count. Proceedings against petitioner were severed before trial. The Government agreed to dismiss the substantive charge of fraud in a bank loan application before the jury reached a verdict, and the jury acquitted petitioner of the substantive count of securities fraud.

trict Court for the Southern District of New York, petitioner was convicted on the conspiracy count. On appeal to the Court of Appeals for the Second Circuit, petitioner raised several grounds, including whether a pledge of stock as collateral for a bank loan is an "offer or sale" under § 17 (a). The Court of Appeals affirmed. 609 F. 2d 51 (1979).[5] We granted certiorari limited to the question whether such a pledge is an "offer or sale." 445 U. S. 960 (1980).

II

Section 17 (a) of the Securities Act of 1933 provides:

> "It shall be unlawful for any person *in the offer or sale of any securities* by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 48 Stat. 84, as amended, 15 U. S. C. § 77q (a) (emphasis added).

Petitioner does not deny that he engaged in a conspiracy to commit fraud through false representations to Bankers Trust concerning the stocks pledged; he does not deny that the shares were "securities" under the Act. Rather, he contends narrowly that these pledges did not constitute "offers" or "sales"

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[5] The Court of Appeals divided over an evidentiary issue. It rejected petitioner's argument regarding the scope of § 17 (a) without comment. See 609 F. 2d, at 66.

under § 17 (a) of the Act. Tr. of Oral Arg. 6.[6] To sustain this contention, petitioner argues that Tri-State deposited the stocks with the bank only as collateral security for a loan, not as a transfer or sale. From this he argues that the implied power to dispose of the stocks could ripen into title and thereby constitute a "sale" only by effecting foreclosure of the various pledges, an event that could not occur without a default on the loans.

We begin by looking to the language of the Act. *E. g., Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 197 (1976). The terms "offer" and "sale" in § 17 (a) are defined in § 2 (3) of the Act:

> "The term 'sale' or 'sell' shall include every contract of sale *or disposition* of a security *or interest in a security*, for value. The term . . . 'offer' shall include every *attempt or offer to dispose of*, or solicitation of an offer to buy, a security *or interest in a security*, for value." 48 Stat. 74, as amended, 15 U. S. C. § 77b (3) (emphasis added).

Obtaining a loan secured by a pledge of shares of stock unmistakably involves a "disposition of [an] interest in a security, for value." Although pledges transfer less than absolute title, the interest thus transferred nonetheless is an "interest in a security." The pledges contemplated a self-executing procedure under a power that could, at the option of the pledgee (the bank) in the event of a default, vest absolute title and ownership. Bankers Trust parted with substantial consideration—specifically, a total of $475,000—and obtained the inchoate but valuable interest under the

[6] The misrepresentations at issue in this case related to the stocks themselves; petitioner does not allege that his conviction, insofar as it involved securities fraud under § 17 (a), was based on misrepresentations made about the financial condition of Tri-State itself. Thus, we need not decide whether misrepresentations or omissions involved in a securities transaction but not pertaining to the securities themselves can form the basis of a violation of § 17 (a).

pledges and concomitant powers. It is not essential under the terms of the Act that full title pass to a transferee for the transaction to be an "offer" or a "sale." See, *e. g., United States* v. *Gentile,* 530 F. 2d 461, 466 (CA2), cert. denied, 426 U. S. 936 (1976).

III

When we find the terms of a statute unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances.'" *TVA* v. *Hill,* 437 U. S. 153, 187, n. 33 (1978) (quoting *Crooks* v. *Harrelson,* 282 U. S. 55, 60 (1930)). Accord, *Aaron* v. *SEC,* 446 U. S. 680, 695 (1980); *Ernst & Ernst* v. *Hochfelder, supra,* at 214, n. 33. No such circumstances are present here, for our reading of the statute is wholly consistent with the history and the purposes of the Securities Act of 1933. The Uniform Sale of Securities Act, a model "blue sky" statute adopted in many states, defined "sale" in language almost identical to that now appearing in § 2 (3).[7] In *Cecil B. De Mille Productions, Inc.* v. *Woolery,* 61 F. 2d 45 (1932), the Court of Appeals for the Ninth Circuit construed this provision of the model statute as adopted by California and held that the definition of "sale" embraced a pledge. Congress subsequently enacted the definition from the Uniform Act almost verbatim. See Federal Securities Act: Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 11 (1933). See generally *id.,* at 13; Securities Act: Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 71 (1933). Petitioner has cited nothing to suggest that Congress did not intend the broad scope that cases arising under the Uniform Act, such as *Woolery, supra,* had given the definition of "sale." See *Lorillard* v. *Pons,* 434 U. S. 575, 581 (1978).

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[7] National Conference of Commissioners on Uniform State Laws, Handbook and Proceedings 174 (1929) (Fourth and Final Draft) ("sale" defined to "include every disposition, or attempt to dispose of a security or interest in a security for value").

Treating pledges as included among "offers" and "sales" comports with the purpose of the Act and, specifically, with that of § 17 (a). We frequently have observed that these provisions were enacted to protect against fraud and promote the free flow of information in the public dissemination of securities. *E. g., United States* v. *Naftalin*, 441 U. S. 768, 774 (1979); *Ernst & Ernst* v. *Hochfelder*, *supra*, at 195. The economic considerations and realities present when a lender parts with value and accepts securities as collateral security for a loan are similar in important respect to the risk an investor undertakes when purchasing shares. Both are relying on the value of the securities themselves, and both must be able to depend on the representations made by the transferor of the securities, regardless of whether the transferor passes full title or only a conditional and defeasible interest to secure repayment of a loan.[8]

Petitioner would have us interpret "offer" and "sale" in a way that not only is cramped but conflicts with the plain meaning of the statute and its purpose as well. We therefore hold that the pledges here were "offers" or "sales" under § 17 (a); accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, concurring in the judgment.

While I agree that a pledge of stock to a bank as collateral for a loan is an "offer or sale" of a security within the mean-

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[8] To the extent that petitioner argues there was no need to protect pledgees, the very fact that Congress saw fit to afford such protection under the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, ends our inquiry, absent a contention, not present here, that the Constitution otherwise prohibits the means selected. "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *TVA* v. *Hill*, 437 U. S. 153, 194 (1978).

ing of § 17 (a) of the Securities Act of 1933, 15 U. S. C. § 77q (a), I reach that conclusion by a slightly different route than does the Court. The Court holds that a pledge confers an "interest in a security," and that therefore a pledge of shares of stock as collateral for a loan constitutes a "disposition of [an] interest in a security, for value" within the meaning of § 2 (3) of the Act, 15 U. S. C. § 77b (3). *Ante*, at 429. I would hold simply that a pledge of stock as collateral is a type of "disposition" within the meaning of § 2 (3). See *United States* v. *Gentile*, 530 F. 2d 461, 466 (CA2), cert. denied, 426 U. S. 936 (1976) (interpreting § 2 (3) of the 1933 Act). Cf. § 3 (a)(14) of the Securities Exchange Act of 1934, 15 U. S. C. § 78c (a)(14) ("[t]he terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of"); *Mansbach* v. *Prescott, Ball & Turben*, 598 F. 2d 1017, 1029 (CA6 1979) (interpreting § 3 (a)(14) of the 1934 Act).

Syllabus

CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ADAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–1841. Argued October 7, 1980—Decided January 21, 1981

While respondent was serving a sentence in a Pennsylvania correctional institution, the Camden County, N. J., prosecutor's office lodged a detainer against him and sought custody pursuant to Art. IV of the Interstate Agreement on Detainers (Detainer Agreement) in order to try him in New Jersey on criminal charges. Article IV, which provides the procedure whereby the receiving State may initiate the prisoner's transfer, states in paragraph (d) that nothing in the Article shall be construed to deprive the prisoner "of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof," but that such delivery may not be opposed on the ground that the sending State's executive authority has not affirmatively consented to or ordered the delivery. Respondent filed an action in the Federal District Court for the Eastern District of Pennsylvania under 42 U. S. C. §§ 1981 and 1983, alleging that petitioners had violated the Due Process and Equal Protection Clauses by failing to grant him the pretransfer hearing that would have been available had his transfer been sought under the Uniform Criminal Extradition Act (Extradition Act), and that petitioners had violated the Due Process Clause by failing to inform him of his right under Art. IV (a) of the Detainer Agreement to petition Pennsylvania's Governor to disapprove New Jersey's request for custody. The District Court dismissed respondent's complaint. The Court of Appeals vacated the District Court judgment and remanded the case, finding it unnecessary to reach respondent's constitutional claims and holding as a matter of statutory construction under federal law that respondent had a right under Art. IV (d) of the Detainer Agreement to the procedural safeguards, including a pretransfer hearing, prescribed by the Extradition Act.

Held:

1. The Detainer Agreement is a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law. An interstate agreement does not fall within the scope of the Federal Constitution's Compact Clause, and will not be invalidated for lack of congressional consent, where the agreement is not "directed to the

formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." But where Congress has authorized the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question. Here, Congress gave its consent to the Detainer Agreement in advance by enacting the Crime Control Consent Act of 1934. That Act was intended to be a grant of consent under the Compact Clause, and the subject matter of the Act is an appropriate subject for congressional legislation. Pp. 438–442.

2. As a matter of statutory construction, a prisoner incarcerated in a jurisdiction that has adopted the Extradition Act is entitled to the procedural protections of that Act, including the right to a pretransfer hearing, before being transferred to another jurisdiction pursuant to Art. IV of the Detainer Agreement. Both the language and legislative history of the Detainer Agreement support the interpretation that, whereas a prisoner initiating the transfer procedure under Art. III waives rights which the sending State affords persons being extradited, including rights provided under the Extradition Act, a prisoner's extradition rights are preserved when the receiving State seeks the prisoner's involuntary transfer under Art. IV of the Detainer Agreement. The phrase "as provided in paragraph (a) hereof," contained in Art. IV (d), modifies "delivery," not "right," and thus Art. IV (d) preserves all the prisoner's extradition rights under state or other law except his right, otherwise available under the Extradition Act, to oppose his transfer on the ground that the sending State's Governor had not explicitly approved the custody request. Moreover, the remedial purpose of the Detainer Agreement in protecting prisoners against whom detainers are outstanding supports an interpretation that gives prisoners the right to a judicial hearing in which they can bring a limited challenge to the receiving State's custody request. Pp. 443–450.

592 F. 2d 720, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post*, p. 450.

Maria Parisi Vickers, Deputy Attorney General of Pennsylvania, argued the cause for petitioners. With her on the

brief were *Edward G. Biester, Jr.*, Attorney General, and *John O. J. Shellenberger*, Deputy Attorney General.

James D. Crawford argued the cause and filed a brief for respondent.*

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to decide a recurring question concerning the relationship between the Interstate Agreement on Detainers and the Uniform Criminal Extradition Act.[1] The specific issue presented is whether a prisoner incarcerated in a jurisdiction that has adopted the Extradition Act is entitled to the procedural protections of that Act—particularly the right to a pretransfer hearing—before being transferred to another jurisdiction pursuant to Art. IV of the Detainer Agreement. The Court of Appeals for the Third Circuit held as a matter of statutory construction that a prisoner is entitled to such protections. 592 F. 2d 720 (1979). The Courts

*Solicitor General McCree, Assistant Attorney General Heymann, William G. Otis, and Elliott Schulder filed a brief for the United States as amicus curiae.

[1] The Interstate Agreement on Detainers, codified in Pennsylvania at 42 Pa. Cons. Stat. § 9101 *et seq.* (Supp. 1980), is a compact among 48 States, the District of Columbia, and the United States. Initially drafted by the Council of State Governments in 1956 and included in the Council's Suggested State Legislation Program for 1957, the Agreement establishes procedures by which one jurisdiction may obtain temporary custody of a prisoner incarcerated in another jurisdiction for the purpose of bringing that prisoner to trial. Unlike the Extradition Act, the Detainer Agreement establishes procedures under which a prisoner may initiate his transfer to the receiving State and procedures that ensure protection of the prisoner's speedy trial rights.

The Uniform Criminal Extradition Act, codified in Pennsylvania at 42 Pa. Cons. Stat. § 9121 *et seq.* (Supp. 1980), has been adopted by 48 States, Puerto Rico, and the Virgin Islands. Initially drafted in 1926 and revised 10 years later, the Extradition Act, like the Detainer Agreement, establishes procedures for the interstate transfer of persons against whom criminal charges are outstanding. Unlike the Detainer Agreement, the Extradition Act applies to persons at liberty as well as to persons in prison.

of Appeals and state courts are divided upon the question,[2] and we granted certiorari to resolve the conflict. 444 U. S. 1069 (1980).

I

In April 1976, respondent John Adams was convicted in Pennsylvania state court of robbery and was sentenced to 30 years in the State Correctional Institution at Graterford, Pa. The Camden County (New Jersey) prosecutor's office subsequently lodged a detainer against respondent and in May 1977 filed a "Request for Temporary Custody" pursuant to Art. IV of the Detainer Agreement in order to bring him to Camden for trial on charges of armed robbery and other offenses.[3]

In an effort to prevent his transfer, respondent filed a *pro se* class-action complaint in June 1977 in the United States District Court for the Eastern District of Pennsylvania. He sought declaratory, injunctive, and monetary relief under 42 U. S. C. §§ 1981 and 1983, alleging (1) that petitioners had violated the Due Process and Equal Protection Clauses by failing to grant him the pretransfer hearing that would have

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[2] Compare *Atkinson* v. *Hanberry*, 589 F. 2d 917 (CA5 1979); *Commonwealth ex rel. Coleman* v. *Cuyler*, 261 Pa. Super. 274, 396 A. 2d 394 (1978); *State* v. *Thompson*, 133 N. J. Super. 180, 336 A. 2d 11 (1975); *Hystad* v. *Rhay*, 12 Wash. App. 872, 533 P. 2d 409 (1975); and *Wertheimer* v. *State*, 294 Minn. 293, 201 N. W. 2d 383 (1972); with 592 F. 2d 720 (CA3 1979) (case below); *McQueen* v. *Wyrick*, 543 S. W. 2d 778 (Mo. 1976); *Moen* v. *Wilson*, 189 Colo. 85, 536 P. 2d 1129 (1975); and *State ex rel. Garner* v. *Gray*, 55 Wis. 2d 574, 201 N. W. 2d 163 (1972).

[3] While the term "detainer" is nowhere defined in the Detainer Agreement, we noted in *United States* v. *Mauro*, 436 U. S. 340 (1978), that the House and Senate Reports accompanying Congress' adoption of the Detainer Agreement had defined a detainer as " 'a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.' " *Id.*, at 359, quoting H. R. Rep. No. 91-1018, p. 2 (1970); S. Rep. No. 91-1356, p. 2 (1970).

been available had he been transferred pursuant to the Extradition Act; and (2) that petitioners had violated the Due Process Clause by failing to inform him of his right pursuant to Art. IV (a) of the Detainer Agreement to petition Pennsylvania's Governor to disapprove New Jersey's request for custody. Respondent contended, *inter alia*, that had he been granted a hearing or advised of his right to petition the Governor, he would have been able to convince Pennsylvania authorities to deny the custody request.[4]

The District Court, without reaching the class certification issue, dismissed respondent's complaint in October 1977 for failure to state a claim upon which relief could be granted. 441 F. Supp. 556. Respondent was then transferred to New Jersey,[5] where he was convicted, sentenced to a 9½-year prison term (to be served concurrently with his Pennsylvania sentence), and returned to Pennsylvania.

The Court of Appeals for the Third Circuit vacated the District Court judgment and remanded for further proceedings. 592 F. 2d 720 (1979). Finding no need to reach respondent's constitutional claims, see *Hagans* v. *Lavine*, 415 U. S. 528, 543 (1974), it concluded as a matter of statutory construction that respondent had a right under Art. IV (d) of the Detainer Agreement to the procedural safeguards, including a pretransfer "hearing," prescribed by § 10 of the Extradition Act. It made no finding with respect to respond-

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[4] Apparently, Adams intended to argue that the State of New Jersey had acted in bad faith by deliberately not filing its custody request until after his chief alibi witness had died. While Adams presumably could have raised that argument in his petition to the Governor, he could not have raised it in either a pretransfer "hearing" under the Extradition Act or in a subsequent habeas proceeding. See n. 11, *infra*.

[5] Although the District Court stated in its October 1977 opinion that Adams had already been transferred to New Jersey, petitioners have informed this Court that the transfer did not actually occur until January 1978, three months after the District Court opinion. See Brief for Petitioners 31, n. 4.

ent's argument that he was entitled to notification of his right to petition the Governor.[6]

II

While this case was on appeal, a Pennsylvania state court held that state prisoners transferred under Art. IV of the Detainer Agreement have no constitutional right to a pretransfer hearing. *Commonwealth ex rel. Coleman* v. *Cuyler*, 261 Pa. Super. 274, 396 A. 2d 394 (1978). Although the Court of Appeals did not reach this constitutional issue, it held that it was not bound by the state court's result because the Detainer Agreement is an interstate compact approved by Congress and is thus a federal law subject to federal rather than state construction. Before reaching the merits of the Third Circuit's decision, we must determine whether that conclusion was correct. We hold that it was.

The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, provides that "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State . . . ." Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 278 (1959); *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 28 (1951); *Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U. S. 419, 427 (1940).[7] It thus remains to be

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[6] Accordingly, we do not reach this issue.

[7] The "law of the Union" doctrine upon which this principle is based had its origin in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518 (1852). In that case, a bridge construction company defended a nuisance suit on the ground that the state legislature had authorized construction of the offending bridge. The company argued that the state legislative authorization shielded it from the nuisance suit because "there is no act of Congress prohibiting obstructions on the Ohio

determined whether the Detainer Agreement is a congressionally sanctioned interstate compact within Art I, § 10, of the Constitution.

The requirement of congressional consent is at the heart of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the

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River, and . . . until there shall be such a regulation, a State, in the construction of bridges, has a right to exercise its own discretion on the subject." This Court rejected that argument in light of a clause in the Virginia-Kentucky Compact of 1789, sanctioned by Congress, declaring that the use and navigation of the Ohio River shall be "free and common to the citizens of the United States." *Id.*, at 565. Even though there had been no Act of Congress explicitly regulating navigation on the river, the Court stated that the prohibition in the Compact was controlling because "[t]his compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?" *Id.*, at 566; see also *Wedding* v. *Meyler*, 192 U. S. 573, 581–582 (1904).

Although the law-of-the-Union doctrine was questioned in *People* v. *Central R. Co.*, 12 Wall. 455, 456 (1872) and in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 109 (1938), any doubts as to its continued vitality were put to rest in *Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U. S., at 427–428, where the Court stated:

"In *People* v. *Central Railroad*, . . . jurisdiction of this Court to review a judgment of a state court construing a compact between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted, . . . and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity' which when 'specially set up and claimed' in a state court may be reviewed here on certiorari under § 237 (b) of the Judicial Code, 28 U. S. C. § 344." *Id.*, at 427.

This holding reaffirmed the law-of-the-Union doctrine and the underlying principle that congressional consent can transform interstate compacts into federal law. Accord, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S., at 278; see also *United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830, 841 (CA3 1975) (Garth, J., concurring); *League to Save Lake Tahoe* v. *Tahoe Regional Planning Agency*, 507 F. 2d 517 (CA9 1974), cert. denied, 420 U. S. 974 (1975).

States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority. See Frankfurter & Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J. 685, 694–695 (1925).

Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States," it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent. See, *e. g.*, *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 468 (1978), quoting *Virginia* v. *Tennessee*, 148 U. S. 503, 519 (1893); *New Hampshire* v. *Maine*, 426 U. S. 363, 369–370 (1976). But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause.[8]

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[8] See *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 26 (1951) (congressional consent given to compact to control pollution in interstate streams, "an appropriate subject for national legislation"); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, *supra*, at 281 (congressional consent given to compact affecting navigable waters and interstate commerce).

As Justice White stated, dissenting in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452 (1978):

"Congress does not pass upon a submitted compact in the manner of a court of law deciding a question of constitutionality. Rather, the requirement that Congress approve a compact is to obtain its political judgment: Is the agreement likely to interfere with federal activity in the area, is it likely to disadvantage other States to an important extent, is it a matter that would better be left untouched by state and federal regulation?" *Id.*, at 485 (footnotes omitted).

Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined. *Virginia* v. *Tennessee, supra,* at 521; *Green* v. *Biddle,* 8 Wheat. 1, 85–87 (1823). In the case of the Detainer Agreement, Congress gave its consent in advance by enacting the Crime Control Consent Act of 1934, 48 Stat. 909, as amended.[9] In pertinent part, this Act provides:

> "The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies . . . ." 4 U. S. C. § 112 (a).

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[9] Congress enacted the Crime Control Consent Act for the express purpose of complying with the "congressional consent" requirement of the Compact Clause. As stated in both the House and Senate Reports accompanying the Act:

"Legislation is necessary to accomplish the purpose sought by the bill because of the language of that part of article I, section 10, of the Constitution which provides:

"'No State shall, without the consent of Congress . . . enter into an agreement or compact with another State . . . .'

. . . . . .

"This bill seeks to remove the obstruction imposed by the Federal Constitution and allow the States cooperatively and by mutual agreement to work out their problems of law enforcement." S. Rep. No. 1007, 73d Cong., 2d Sess., 1 (1934); H. R. Rep. No. 1137, 73d Cong., 2d Sess., 1–2 (1934).

There can be no doubt that the Detainer Agreement falls within the scope of this congressional authorization. Not only do the drafters of the Agreement state in their interpretive handbook that it "falls within the purview" of the 1934 Act and therefore has the consent of Congress, see Council of State Governments, The Handbook of Interstate Crime Control 117 (1978), but also Congress itself, when adopting the Detainer Agreement on behalf of the District of Columbia and the United States, Pub. L. 91–538, 84 Stat. 1397, expressly stated that it had authorized the Detainer Agreement in the Crime Control Consent Act. See H. R. Rep. No. 91–1018 (1970); S. Rep. No. 91–1356 (1970). At the same time, Congress implicitly reaffirmed its consent to the Agreement.

Because this Act was intended to be a grant of consent under the Compact Clause, and because the subject matter of the Act is an appropriate subject for congressional legislation,[10] we conclude that the Detainer Agreement is a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law. We therefore turn to the merits of the Court of Appeals' holding that as a matter of statutory construction Art. IV (d) of the Detainer Agreement is to be read as incorporating the procedural safeguards provided by § 10 of the Extradition Act.

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[10] Congressional power to legislate in this area is derived from both the Commerce Clause and the Extradition Clause. The latter Clause, Art. IV, § 2, cl. 2, has provided Congress with power to legislate in the extradition area since 1793 when it passed the first Federal Extradition Act, 1 Stat. 302, now codified at 18 U. S. C. § 3182. See *Michigan* v. *Doran*, 439 U. S. 282, 286–287 (1978); *Innes* v. *Tobin*, 240 U. S. 127, 130–131, 134–135 (1916); *Roberts* v. *Reilly*, 116 U. S. 80, 94 (1885); *Robb* v. *Connolly*, 111 U. S. 624, 628 (1884); *Kentucky* v. *Dennison*, 24 How. 66, 104–105 (1861); *DeGenna* v. *Grasso*, 413 F. Supp. 427, 431 (Conn.), aff'd *sub nom. Carino* v. *Grasso*, 426 U. S. 913 (1976).

Congress' recognition that it had power to legislate in this area is also evidenced by the House and Senate Reports accompanying the 1934 Act,

"The rapidity with which persons may move from one State to another, those charged with crime and those who are necessary witnesses in criminal proceedings, and the fact that there are no barriers between the States obstructing this movement, makes it *necessary that one of two things shall be done, either that the criminal jurisdiction of the Federal Government shall be greatly extended or that the States by mutual agreement shall aid each other in the detection and punishment of offenders against their respective criminal laws.*" S. Rep. No. 1007, *supra*, at 1 (emphasis added); H. R. Rep. No. 1137, *supra*, at 1 (emphasis added).

Despite the contrary suggestion made by the dissent, *post*, at 453–454, we do not decide today whether the cited examples of "reciprocal legislation in the criminal area" have received congressional consent or whether the subject matter of any of the cited Acts is an appropriate subject for congressional legislation. Those determinations must await cases properly raising the Compact Clause question with respect to those Acts.

III

The Detainer Agreement and the Extradition Act both establish procedures for the transfer of a prisoner in one jurisdiction to the temporary custody of another jurisdiction. A prisoner transferred under the Extradition Act is explicitly granted a right to a pretransfer "hearing" at which he is informed of the receiving State's request for custody, his right to counsel, and his right to apply for a writ of habeas corpus challenging the custody request. He is also permitted "a reasonable time" in which to apply for the writ.[11] However, no similar explicit provision is to be found in the Detainer Agreement.

The Detainer Agreement establishes two procedures under which the prisoner against whom a detainer has been lodged may be transferred to the temporary custody of the receiving State. One of these procedures may be invoked by the

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[11] Section 10 of the Uniform Criminal Extradition Act, codified in Pennsylvania at 42 Pa. Cons. Stat. § 9131 (Supp. 1980), provides;

"No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this Commonwealth who shall inform him of the demand made for his surrender and of the crime with which he is charged and that he has the right to demand and procure legal counsel, and, if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus."

The person being extradited has no right to challenge the facts surrounding the underlying crime or the lodging of the custody request at the first hearing. Even at the later habeas corpus hearing, if any, he is permitted to question only

"(a) whether the extradition documents on their face are in order; (b) whether [he] has been charged with a crime in the demanding state; (c) whether [he] is the person named in the request for extradition; and (d) whether [he] is a fugitive." *Michigan* v. *Doran*, *supra*, at 289.

prisoner; the other by the prosecuting attorney of the receiving State.

Article III of the Agreement provides the prisoner-initiated procedure. It requires the warden to notify the prisoner of all outstanding detainers and then to inform him of his right to request final disposition of the criminal charges underlying those detainers. If the prisoner initiates the transfer by demanding disposition (which under the Agreement automatically extends to *all* pending charges in the receiving State), the authorities in the receiving State must bring him to trial within 180 days or the charges will be dismissed with prejudice, absent good cause shown.

Article IV of the Agreement provides the procedure by which the prosecutor in the receiving State may initiate the transfer. First, the prosecutor must file with the authorities in the sending State written notice of the custody request, approved by a court having jurisdiction to hear the underlying charges. For the next 30 days, the prisoner and prosecutor must wait while the Governor of the sending State, on his own motion or that of the prisoner, decides whether to disapprove the request.[12] If the Governor does not disapprove, the prisoner is transferred to the temporary custody of the receiving State where he must be brought to trial on the charges underlying the detainer within 120 days of his arrival. Again, if the prisoner is not brought to trial within the time period, the charges will be dismissed with prejudice, absent good cause shown.

Although nothing in the Detainer Agreement explicitly provides for a pretransfer hearing, respondent contends that prisoners who are involuntarily transferred under Art. IV are

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[12] Article IV (a) provides in pertinent part:

"[T]here shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner."

entitled to greater procedural protections than those who initiate the transfer procedure under Art. III. He argues that a prisoner who initiates his own transfer to the receiving State receives a significant benefit under the Agreement and may thus be required to waive any right he might have to contest his transfer; but that a prisoner transferred against his will to the receiving State under Art. IV does not benefit from the Agreement and is thus entitled to assert any right he might have had under the Extradition Act (or any other state law applicable to interstate transfer of prisoners) to challenge his transfer.

Respondent's argument has substantial support in the language of the Detainer Agreement. Article III (e) provides that "[a]ny request for final disposition made by a prisoner [under this Article] *shall also be deemed to be a waiver of extradition* with respect to any charge or proceeding contemplated thereby . . . ." (Emphasis added.) The reference to "waiver of extradition" can reasonably be interpreted to mean "waiver of those rights the sending state affords persons being extradited." Since Pennsylvania has adopted the Uniform Criminal Extradition Act, those rights would include the rights provided by § 10 of that Act.

The language of Art. IV supports respondent's further contention that a prisoner's extradition rights are meant to be preserved when the receiving State seeks disposition of an outstanding detainer. Article IV (d) provides:

> "Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery."

Petitioners argue that the phrase "as provided in paragraph (a) hereof" modifies "right," not "delivery," and that para-

graph (d) does no more than protect the right paragraph (a) gives the prisoner to petition the Governor to disapprove the custody request.[13] The Court of Appeals rejected this interpretation, concluding that the phrase "as provided in paragraph (a) hereof" modifies "delivery," not "right." Since the major thrust of paragraph (a) is to describe the means by which the receiving State may obtain temporary custody of the prisoner, the Court of Appeals held that paragraph (d) must have been intended as the vehicle for incorporating all rights a prisoner would have under state or other laws to contest his transfer, except that the prisoner must forfeit his right, otherwise available under § 7 of the Extradition Act,[14] to oppose such transfer on the ground that the Governor had not explicitly approved the custody request.

There are three textual reasons why we find this interpretation convincing. First, if paragraph (d) protects only the right provided by paragraph (a) to petition the Governor, as petitioners claim, it is difficult to understand what purpose paragraph (d) serves in the Agreement. Why would the drafters add a second provision to protect a right already explicitly provided? Common sense requires paragraph (d) to be construed as securing something more.

Second, the one ground for contesting a transfer that paragraph (d) explicitly withholds from the prisoner—that the transfer has not been affirmatively approved by the Gover-

[13] Paragraph (a) performs two functions. First, it provides the means by which the receiving State may request the custody of a prisoner incarcerated in the sending State. Second, it authorizes the Governor of the sending State to disapprove that custody request either on his own motion or on that of the prisoner.

[14] Section 7 of the Uniform Criminal Extradition Act, codified in Pennsylvania at 42 Pa. Cons. Stat. § 9128 (Supp. 1980), provides:

"If the Governor decides that the demand should be complied with he shall sign a warrant of arrest which shall be sealed with the State seal and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance."

nor—is a ground that the Extradition Act expressly reserves to the prisoner. It is surely reasonable to conclude from the elimination of this ground in the Detainer Agreement that the drafters meant the Detainer Agreement to be read as not affecting any rights given prisoners by the Extradition Act that are not expressly withheld by the Detainer Agreement. As the Court of Appeals concluded, "the fact that Article IV (d) does specifically refer to one minor procedural feature of the extradition process which is to be affected suggests forcefully that the other aspects, particularly those furnishing safeguards to the prisoner, are to continue in effect." 592 F. 2d, at 724.

Finally, paragraph (d) refers to "*any* right [the prisoner] may have" (emphasis added) to challenge the legality of his transfer. This suggests that more than one right is involved, a suggestion that is consistent with respondent's contention that *all* pre-existing rights are preserved. If petitioners' contention were correct—that the only right preserved is the right provided in paragraph (a) to petition the Governor—it is much more likely that paragraph (d) would have referred narrowly to "*the* right the prisoner *does* have" to challenge the legality of his transfer.

The legislative history of the Detainer Agreement, contained in the comments on the draft Agreement made by the Council of State Governments at its 1956 conference and circulated to all the adopting States, further supports the Court of Appeals' reading. In discussing the different degrees of protection to which a prisoner is entitled under Arts. III and IV of the Agreement, the drafters stated:

> "*Article IV (d) safeguards certain of the prisoner's rights.* Normally, the only way to get a prisoner from one jurisdiction to another for purposes of trial on an indictment, information or complaint is through resort to extradition or waiver thereof. If the prisoner waives, there is no problem. However, *if he does not waive extradition, it*

> *is not appropriate to attempt to force him to give up the safeguards of the extradition process*, even if this could be done constitutionally." Council of State Governments, Suggested State Legislation, Program for 1957, pp. 78–79 (1956) (emphasis added).

The suggestion, of course, is that a prisoner transferred against his will under Art. IV should be entitled to whatever "safeguards of the extradition process" he might otherwise have enjoyed. Those safeguards include the procedural protections of the Extradition Act (in those States that have adopted it), as well as any other procedural protections the sending State guarantees persons being extradited from within its borders.

That this is what the drafters intended is further suggested by the distinction they make between Art. III and Art. IV procedures:

> "The situation contemplated by this portion of the agreement [Article IV] is different than that dealt with in Article III. [Article III] relates to proceedings initiated at the request of the prisoner. Accordingly, in such instances it is fitting that the prisoner be required to waive extradition. In Article IV the prosecutor initiates the proceeding. Consequently, it probably would be improper to require the prisoner to waive those features of the extradition process which are designed for the protection of his rights." *Id.*, at 79.

These statements strongly support respondent's contention that prisoners were meant to be treated differently depending on which Article was being invoked, and that the general body of procedural rights available in the extradition context was meant to be preserved when the transfer was effected pursuant to Art. IV.

Article IX of the Detainer Agreement states that the Agreement "shall be liberally construed so as to effectuate its purpose." The legislative history of the Agreement, including

the comments of the Council of State Governments and the congressional Reports and debates preceding the adoption of the Agreement on behalf of the District of Columbia and the Federal Government, emphasizes that a primary purpose of the Agreement is to protect prisoners against whom detainers are outstanding. As stated in the House and Senate Reports:

> "[A] prisoner who has had a detainer lodged against him is seriously disadvantaged by such action. He is in custody and therefore in no position to seek witnesses or to preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. What is more, when detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing." H. R. Rep. No. 91–1018, p. 3 (1970); S. Rep. No. 91–1356, p. 3 (1970).

The remedial purpose of the Agreement supports an interpretation that gives prisoners the right to a judicial hearing in which they can bring a limited challenge to the receiving State's custody request.[15] In light of the purpose of the Detainer Agreement, as reflected in the structure of the Agree-

[15] Petitioners contend that our interpretation frustrates one of the major purposes of the Detainer Agreement, which is to streamline the extradition process. We cannot accept that argument. The Detainer Agreement already provides a 30-day period from the date the prosecutor makes a request for custody until the date the prisoner can be transferred. Even if the hearing required by the Extradition Act could not be held until after the expiration of that 30-day period, which we do not now decide, there is no reason the prisoner could not be brought before a court on the 31st day. Moreover, the "reasonable time" a judge fixes for a prisoner to file for a writ of habeas corpus under the Extradition Act might also be computed in recognition of the 30-day period established by the Detainer Agreement.

ment, its language, and its legislative history, we conclude as a matter of federal law that prisoners transferred pursuant to the provisions of the Agreement are not required to forfeit any pre-existing rights they may have under state or federal law to challenge their transfer to the receiving State. Respondent Adams has therefore stated a claim for relief under 42 U. S. C. § 1983 for the asserted violation by state officials of the terms of the Detainer Agreement. See *Maine* v. *Thiboutot*, 448 U. S. 1 (1980).

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE STEWART join, dissenting.

In a remarkable feat of judicial alchemy the Court today transforms state law into federal law. It decides that the construction of an enactment of the Pennsylvania Legislature, for which the consent of Congress was not required under the Constitution, and to which Congress never consented at all save in the vaguest terms some 25 years prior to its passage, presents a federal question. *Ante*, Part II. Nothing in the prior decisions of this Court suggests, say nothing of compels, such an untoward result.

The cases relied upon by the Court establish, at most, that the interpretation of an interstate compact sanctioned by Congress *pursuant to the Compact Clause* will present a federal question. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 278 (1959) ("The construction of a compact sanctioned by Congress *under Art. I, § 10, cl. 3, of the Constitution* presents a federal question") (emphasis supplied); *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 27 (1951) ("congressional consent [was] required"); *Delaware River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U. S. 419, 427 (1940) ("the construction of . . . a compact sanctioned by Congress *by virtue of Article I, § 10, Clause 3 of the Constitution*, involves a federal 'title, right, privilege or immu-

nity' ") (emphasis supplied). In light of our recent decisions, however, it cannot seriously be contended that the Detainer Agreement constitutes an "agreement or compact" as those terms have come to be understood in the Compact Clause. In *New Hampshire* v. *Maine*, 426 U. S. 363 (1976), we held that the "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of the political power in the States, which may encroach upon or interfere with the just supremacy of the United States.' " *Id.*, at 369, quoting *Virginia* v. *Tennessee*, 148 U. S. 503, 519 (1893). This rule was reaffirmed in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 471 (1978), where the Court ruled that the quoted test "states the proper balance between federal and state power with respect to compacts and agreements among States." Certainly nothing about the Detainer Agreement threatens the just supremacy of the United States or enhances state power to the detriment of federal sovereignty. As with the "compact" in *Multistate Tax Comm'n*, any State is free to join the Detainer Agreement, so it cannot be considered to elevate member States at the expense of nonmembers. See *id.*, at 477–478. Finally, despite contrary intimations by the Court, *ante*, at 441, n. 9, the views of the drafters of the Agreement or its form are not controlling. The agreement involved in *Multistate Tax Comm'n* was termed a "compact" and congressional consent to it was repeatedly sought, 434 U. S., at 456, 458, n. 8, yet the Court nonetheless held it was not a compact within the Compact Clause. See also *id.*, at 470–471 ("The mere form of the interstate agreement cannot be dispositive. . . . The relevant inquiry must be one of impact on our federal structure").

Since the Detainer Agreement is not an "agreement or compact" within the purview of the Compact Clause, that constitutional provision is irrelevant to this case, and the Court's reliance on it can only be described as baffling. Al-

though never maintaining that congressional consent was required by the Compact Clause for the Detainer Agreement—a conclusion foreclosed by our decisions—the Court nonetheless views its inquiry as "whether the Detainer Agreement is a congressionally sanctioned interstate compact *within Art. I, § 10, of the Constitution*" and concludes in this case that "the consent of Congress transforms the State's agreement into federal law *under the Compact Clause.*" *Ante,* at 439, 440 (emphasis supplied). Whether a particular state enactment is "within" or "under" the Compact Clause, however, depends on whether it requires the consent of Congress—the Clause speaks of nothing else. Whatever effect the Compact Clause may have on those laws it *does* cover, one would have thought it unnecessary to say that it can have no effect on those it *does not* cover. See Engdahl, Construction of Interstate Compacts: A Questionable Federal Question, 51 Va. L. Rev. 987, 1017 (1965) ("[T]he construction of a compact not requiring consent, even if Congress has consented, will not present a federal question . . ."). The Court stresses the federal interest in the area of extradition, *ante,* at 442, n. 10, but, for Compact Clause purposes, "[a]bsent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant." *Multistate Tax Comm'n, supra,* at 480, n. 33.

If the Compact Clause of the Constitution does not operate to transform Pennsylvania's statute into federal law, it must be the consent of Congress, albeit unnecessary, which does so. Such a proposition is, however, contrary to the established rule in other contexts. The most fundamental example was discussed in *Coyle* v. *Smith,* 221 U. S. 559, 568 (1911):

> ". . . Congress may require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to

> alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress."

The consent of Congress to state taxation of its instrumentalities does not mean that the interpretation of state tax laws presents a federal question, see *Gully* v. *First National Bank*, 299 U. S. 109, 115 (1936) ("That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid") (emphasis in original), and when Congress consents to state laws regulating commerce which would otherwise be prohibited the state laws remain state laws, see *In re Rahrer*, 140 U. S. 545, 561 (1891) (by consent ". . . Congress has not attempted to delegate the power to regulate commerce, . . . or to adopt state laws"); *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 438, n. 51 (1946) ("The . . . contention that Congress' 'adoption' of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner"). See generally Engdahl, *supra*, at 1015–1016. It is particularly unsettling that the Court would confuse an act of congressional consent with an act of legislation when the consent was completely gratuitous and given some 25 years before passage of the state law.

What is most disturbing about the Court's analysis is its potential sweep. The statute books of the States are full of reciprocal legislation in the criminal area. See, *e. g.*, Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 11 U. L. A. 1 (Supp. 1980) (adopted in 54 jurisdictions); Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act, 11 U. L. A. 547 (Supp. 1980) (adopted in 13 jurisdictions). As this Court made clear in *Multistate Tax Comm'n*, 434 U. S.,

at 469–471, such reciprocal legislation is as subject to the Compact Clause as other more formal interstate agreements. See *ibid.* (discussing *New York* v. *O'Neill*, 359 U. S. 1 (1959), a case involving the Uniform Act to Secure the Attendance of Witnesses); see also 434 U. S., at 491 (WHITE, J., dissenting). In light of the Court's analysis in this case, it is not at all clear why the construction of each of the provisions in this broad array of state legislation is not a federal matter. It is apparently no answer that congressional consent was not required under the Compact Clause; the same is true with the Detainer Agreement. And the congressional "consent" in the Crime Control Consent Act of 1934 applies with the same force to all this reciprocal legislation as it does to the Detainer Agreement. Yet it has never been supposed that the construction of the terms of such reciprocal legislation is a matter on which federal courts could override the courts of the enacting State. Enough has been said to demonstrate that the Court's opinion threatens to become a judicial Midas meandering through the state statute books, turning everything it touches into federal law.

Since I view the Detainer Agreement as a state statute, I would defer to the state court's interpretation of it. It is sufficiently clear to me that the court in *Commonwealth ex rel. Coleman* v. *Cuyler*, 261 Pa. Super. 274, 396 A. 2d 394 (1978), disagrees with the statutory interpretation undertaken by the Court of Appeals below and by this Court.*

*Judge Van der Voort, writing the opinion for the Pennsylvania court, assumed that the procedural protections sought by respondent were not incorporated as a matter of statutory interpretation in the Detainer Agreement, since he ruled that there was no constitutional deprivation in not affording those protections to prisoners subject to the Detainer Agreement. The state-court opinion contained a comprehensive survey of the features of both the Detainer Agreement and the Extradition Act, and did not read the Detainer Agreement to contain the protections which the federal court said were incorporated. Even Judge Spaeth, who dissented on the equal protection ground in the court decision, obviously considered

I would therefore reverse and remand, with instructions to the Court of Appeals to consider respondent's constitutional claims, which it avoided by what I consider unjustifiable statutory interpretation.

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that the procedural protections under the two Acts were different, or else there could not have been an equal protection challenge. See also *Wallace* v. *Hewitt*, 428 F. Supp. 39 (MD Pa. 1976).

MINNESOTA *v.* CLOVER LEAF CREAMERY CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 79–1171. Argued November 3, 1980—Decided January 21, 1981

For the stated purposes of promoting resource conservation, easing solid waste disposal problems, and conserving energy, the Minnesota Legislature enacted a statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard cartons. Respondents filed suit in Minnesota District Court, seeking to enjoin enforcement of the statute on constitutional grounds. The District Court held that the statute violated, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause. Finding that "the evidence conclusively demonstrate[d] that the discrimination against plastic nonrefillables [was] not rationally related to the Act's objectives," the Minnesota Supreme Court affirmed on the equal protection ground without reaching the Commerce Clause issue.

Held:

1. The ban on plastic nonreturnable milk containers bears a rational relation to the State's objectives and must be sustained under the Equal Protection Clause. Pp. 461–470.

(a) The Equal Protection Clause does not deny Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another already established type is permitted to continue in use. Whether *in fact* the statute will promote more environmentally desirable milk packaging is not the question. The Equal Protection Clause is satisfied if the Minnesota Legislature *could rationally have decided* that its ban on plastic milk jugs might foster greater use of environmentally desirable alternatives. Pp. 465–466.

(b) The fact that the state legislature, having concluded that nonreturnable, nonrefillable milk containers pose environmental hazards, decided to ban the most recent entry in the field, and thus, in effect, "grandfathered" paperboard containers, at least temporarily, does not make the ban on plastic containers arbitrary or irrational. Cf. *New Orleans* v. *Dukes*, 427 U. S. 297. Pp. 466–468.

(c) Where the evidence as to whether the statute would help to conserve energy was "at least debatable," the Minnesota Supreme Court erred in substituting its judgment for that of the legislature by finding, contrary to the legislature, that the production of plastic nonrefillable

containers required less energy than production of paper containers. Pp. 468–469.

(d) Similarly, the Minnesota Supreme Court erred in finding, contrary to the legislature's finding based on a reputable study, that plastic milk jugs take up less space in landfills and present fewer solid waste disposal problems than do paperboard containers. Pp. 469–470.

2. The statute does not violate the Commerce Clause as constituting an unreasonable burden on interstate commerce. Pp. 470–474.

(a) The statute does not discriminate between interstate and intrastate commerce but regulates evenhandedly by prohibiting all milk retailers from selling their products in plastic containers, without regard to whether the milk, the containers, or the sellers are from outside the State. Pp. 471–472.

(b) The incidental burden imposed on interstate commerce by the statute is not excessive in relation to the putative local benefits. Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of container, the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems. These local benefits amply support Minnesota's decision under the Commerce Clause. Pp. 472–474.

289 N. W. 2d 79, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 474. STEVENS, J., filed a dissenting opinion, *post*, p. 477. REHNQUIST, J., took no part in the consideration or decision of the case.

Kenneth E. Raschke, Jr., Assistant Attorney General of Minnesota, argued the cause for petitioner. With him on the briefs were *Warren Spannaus*, Attorney General, *Richard B. Allyn*, Chief Deputy Attorney General, and *D. Douglas Blanke*, Special Assistant Attorney General.

Leonard J. Keyes argued the cause for respondents. With him on the brief were *Douglas L. Skor* and *Andrea M. Bond*.

Harlon L. Dalton argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Harriet S. Shapiro, Jacques B. Gelin,* and *Anne H. Shields.**

JUSTICE BRENNAN delivered the opinion of the Court:

In 1977, the Minnesota Legislature enacted a statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons. 1977 Minn. Laws, ch. 268, Minn. Stat. § 116F.21 (1978). Respondents[1] contend that the statute violates the Equal Protection and Commerce Clauses of the Constitution.

I

The purpose of the Minnesota statute is set out as § 1:

> "The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste, and depletes natural resources. The legislature therefore, in

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**Stephen J. Snyder* filed a brief for the Sierra Club as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *C. Lee Cook, Jr., John C. Berghoff, Jr.,* and *Stephanie W. Kanwit* for the Can Manufacturers Institute et al.; by *John M. Cannon* for the Mid-America Legal Foundation; and by *Michael L. Flanagan* for the Minnesota Dairies Federation.

[1] Respondents, plaintiffs below, are a Minnesota dairy that owns equipment for producing plastic nonreturnable milk jugs, a Minnesota dairy that leases such equipment, a non-Minnesota company that manufactures such equipment, a Minnesota company that produces plastic nonreturnable milk jugs, a non-Minnesota dairy that sells milk products in Minnesota in plastic nonreturnable milk jugs, a Minnesota milk retailer, a non-Minnesota manufacturer of polyethylene resin that sells such resin in many States, including Minnesota, and a plastics industry trade association.

> furtherance of the policies stated in Minnesota Statutes, Section 116F.01,[2] determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged." 1977 Minn. Laws, ch. 268, § 1, codified as Minn. Stat. § 116F.21 (1978).

Section 2 of the Act forbids the retail sale of milk and fluid milk products, other than sour cream, cottage cheese, and yogurt, in nonreturnable, nonrefillable rigid or semirigid containers composed at least 50% of plastic.[3]

The Act was introduced with the support of the state Pollution Control Agency, Department of Natural Resources, Department of Agriculture, Consumer Services Division, and Energy Agency,[4] and debated vigorously in both houses of the state legislature. Proponents of the legislation argued that it would promote resource conservation, ease solid waste disposal problems, and conserve energy. Relying on the results of studies and other information,[5] they stressed the need to

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[2] Minnesota Stat. § 116F.01 (1978) provides in relevant part:

"*Statement of policy.* The legislature seeks to encourage both the reduction of the amount and type of material entering the solid waste stream and the reuse and recycling of materials. Solid waste represents discarded materials and energy resources, and it also represents an economic burden to the people of the state. The recycling of solid waste materials is one alternative for the conservation of material and energy resources, but it is also in the public interest to reduce the amount of materials requiring recycling or disposal."

[3] Minnesota is apparently the first State so to regulate milk containers. 289 N. W. 2d 79, 81, n. 6 (1979).

[4] Transcript of the Debate of the Minnesota House of Representatives on H. F. 45, p. 1 (Mar. 10, 1977), reprinted as Plaintiffs' Exhibit J.

[5] The principal empirical study cited in legislative debate, see, *e. g.*, Transcript of the Full Senate Floor Discussion on H. F. 45, p. 12 (May 20, 1977), reprinted as Plaintiffs' Exhibit J (statement of Sen. Luther), is Midwest Research Institute, Resource and Environmental Profile Analysis of Five Milk Container Systems, admitted into evidence as Plaintiffs' Exhibit I.

stop introduction of the plastic nonreturnable container before it became entrenched in the market. Opponents of the Act, also presenting empirical evidence, argued that the Act would not promote the goals asserted by the proponents, but would merely increase costs of retail milk products and prolong the use of ecologically undesirable paperboard milk cartons.

After the Act was passed, respondents filed suit in Minnesota District Court, seeking to enjoin its enforcement. The court conducted extensive evidentiary hearings into the Act's probable consequences, and found the evidence "in sharp conflict." App. A–25. Nevertheless, finding itself "as fact-finder . . . obliged to weigh and evaluate this evidence," *ibid.*, the court resolved the evidentiary conflicts in favor of respondents, and concluded that the Act "will not succeed in effecting the Legislature's published policy goals . . . ." *Id.*, at A–21. The court further found that, contrary to the statement of purpose in § 1, the "actual basis" for the Act "was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." *Id.*, at A–19. The court therefore declared the Act "null, void, and unenforceable" and enjoined its enforcement, basing the judgment on substantive due process under the Fourteenth Amendment to the United States Constitution and Art. 1, § 7, of the Minnesota Constitution; equal protection under the Fourteenth Amendment; and prohibition of unreasonable burdens on interstate commerce under Art. I, § 8, of the United States Constitution. App. A–23.

The State appealed to the Supreme Court of Minnesota, which affirmed the District Court on the federal equal protection and due process grounds, without reaching the Commerce Clause or state-law issues. 289 N. W. 2d 79 (1979). Unlike the District Court, the State Supreme Court found that the purpose of the Act was "to promote the state in

terests of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream," and acknowledged the legitimacy of this purpose. *Id.*, at 82. Nevertheless, relying on the District Court's findings of fact, the full record, and an independent review of documentary sources, the State Supreme Court held that "the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives." *Ibid.* We granted certiorari, 445 U. S. 949, and now reverse.

II

The parties agree that the standard of review applicable to this case under the Equal Protection Clause is the familiar "rational basis" test. See *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976).[6] Moreover, they agree that the purposes of the Act

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[6] JUSTICE STEVENS' dissenting opinion argues that the Minnesota Supreme Court when reviewing a challenge to a Minnesota statute on equal protection grounds is not bound by the limits applicable to federal courts, but may independently reach conclusions contrary to those of the legislature concerning legislative facts bearing on the wisdom or utility of the legislation. This argument, though novel, is without merit. A state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses. *E. g.*, *Baker* v. *City of Fairbanks*, 471 P. 2d 386, 401–402 (Alaska 1970); *Serrano* v. *Priest*, 18 Cal. 3d 728, 764–765, 557 P. 2d 929, 950–951 (1976), cert. denied, 432 U. S. 907 (1977); *State* v. *Kaluna*, 55 Haw. 361, 368–369, 520 P. 2d 51, 58–59 (1974); see Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). And as the dissent correctly notes, *post*, at 479–481, the States are free to allocate the lawmaking function to whatever branch of state government they may choose. *Uphaus* v. *Wyman*, 360 U. S. 72, 77 (1959); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 256–257 (1957) (Frankfurter, J., concurring in result); *Dreyer* v. *Illinois*, 187 U. S. 71, 83–84 (1902). But when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not

cited by the legislature—promoting resource conservation, easing solid waste disposal problems, and conserving energy—are legitimate state purposes. Thus, the controversy in this

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free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed. *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975).

The standard of review under equal protection rationality analysis—without regard to which branch of the state government has made the legislative judgment—is governed by federal constitutional law, and a state court's application of that standard is fully reviewable in this Court on writ of certiorari. 28 U. S. C. § 1257 (3). JUSTICE STEVENS concedes the flaw in his argument when he admits that "a state court's decision invalidating state legislation on federal constitutional grounds may be reversed by this Court if the state court misinterpreted the relevant federal constitutional standard." *Post*, at 489. And contrary to his argument that today's judgment finds "no precedent in this Court's decisions," *post*, at 482, we have frequently reversed State Supreme Court decisions invalidating state statutes or local ordinances on the basis of equal protection analysis more stringent than that sanctioned by this Court. *E. g., Idaho Dept. of Employment* v. *Smith*, 434 U. S. 100 (1977); *Arlington County Board* v. *Richards*, 434 U. S. 5 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24 (1974); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). See also *North Dakota Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156 (1973); *Dean* v. *Gadsen Times Publishing Corp.*, 412 U. S. 543 (1973); *McDaniel* v. *Barresi*, 402 U. S. 39 (1971). Never have we suggested that our review of the judgments in such cases differs in any relevant respect because they were reached by state courts rather than federal courts.

Indeed, JUSTICE STEVENS has changed his own view. Previously he has stated that state-court decisions under the Fourteenth Amendment granting litigants "more protection than the Federal Constitution requires," are in error. *Idaho Dept. of Employment* v. *Smith*, *supra*, at 104 (STEVENS, J., dissenting in part). This is in agreement with the conclusion of one commentator:

"In reviewing state court resolutions of federal constitutional issues, the Supreme Court has not differentiated between those decisions which sustain and those which reject claims of federal constitutional right. In both instances, once having granted review, the Court has simply determined whether the state court's federal constitutional decision is 'correct,' meaning, in this context, whether it is the decision that the Supreme Court would independently reach." Sager, Fair Measure: The Legal Status of

case centers on the narrow issue whether the legislative classification between plastic and nonplastic nonreturnable milk containers is rationally related to achievement of the statutory purposes.[7]

A

Respondents apparently have not challenged the *theoretical* connection between a ban on plastic nonreturnables and the purposes articulated by the legislature; instead, they have argued that there is no *empirical* connection between the two. They produced impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers will be to deplete natural resources, exacerbate solid waste disposal problems, and waste energy, because consumers unable to purchase milk in plastic

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Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1243 (1978) (footnote omitted).

Thus, JUSTICE STEVENS' argument in the dissenting opinion that today's treatment of the instant case is extraordinary and unprecedented, see *post*, at 482, and n. 7, is simply wrong.

[7] Respondents, citing the District Court's Finding of Fact No. 12, App. A–19, also assert that the actual purpose for the Act was illegitimate: to "isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries." Brief for Respondents 23. We accept the contrary holding of the Minnesota Supreme Court that the articulated purpose of the Act is its actual purpose. See 289 N. W. 2d, at 82. In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they "could not have been a goal of the legislation." See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648, n. 16 (1975). Here, a review of the legislative history supports the Minnesota Supreme Court's conclusion that the principal purposes of the Act were to promote conservation and ease solid waste disposal problems. The contrary evidence cited by respondents, see Brief for Respondents 29–31, is easily understood, in context, as economic defense of an Act genuinely proposed for environmental reasons. We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry.

containers will turn to paperboard milk cartons, allegedly a more environmentally harmful product.

But States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance* v. *Bradley*, 440 U. S., at 111. See also *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 425 (1952); *Henderson Co.* v. *Thompson*, 300 U. S. 258, 264–265 (1937).

Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153–154 (1938),[8] they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." *Id.*, at 154. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.

The District Court candidly admitted that the evidence was "in sharp conflict," App. A–25, but resolved the conflict in favor of respondents and struck down the statute. The Supreme Court of Minnesota, however, did not reverse on the basis of this patent violation of the principles governing rationality analysis under the Equal Protection Clause. Rather, the court analyzed the statute afresh under the Equal Protection Clause, and reached the conclusion that the statute is

[8] We express no view whether the District Court could have dismissed this case on the pleadings or granted summary judgment for the State on the basis of the legislative history, without hearing respondents' evidence. See *Vance* v. *Bradley*, 440 U. S. 93, 109–112 (1979); *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422 (1936).

constitutionally invalid. The State contends that in this analysis the court impermissibly substituted its judgment for that of the legislature. We turn now to that argument.

B

The State identifies four reasons why the classification between plastic and nonplastic nonreturnables is rationally related to the articulated statutory purposes. If any one of the four substantiates the State's claim, we must reverse the Minnesota Supreme Court and sustain the Act.

First, the State argues that elimination of the popular plastic milk jug will encourage the use of environmentally superior containers. There is no serious doubt that the plastic containers consume energy resources and require solid waste disposal, nor that refillable bottles and plastic pouches are environmentally superior. Citing evidence that the plastic jug is the most popular, and the gallon paperboard carton the most cumbersome and least well regarded package in the industry, the State argues that the ban on plastic nonreturnables will buy time during which environmentally preferable alternatives may be further developed and promoted.

As Senator Spear argued during the Senate debate:

> "[T]his bill is designed to prevent the beginning of another system of non-returnables that is going to be very, very difficult [to stop] once it begins. It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another non-returnable system with all the investment and all of the vested interest that that is going to involve to begin." Transcript of the Full Senate Floor Discussion of H. F. 45, p. 6 (May 20, 1977), reprinted as Plaintiffs' Exhibit J.

Accord, *id.*, at 1–2 (statement of Sen. Luther).

The Minnesota Supreme Court dismissed this asserted state interest as "speculative and illusory." 289 N. W. 2d, at 86. The court expressed doubt that the Minnesota Legislature or Pollution Control Agency would take any further steps to promote environmentally sound milk packaging, and stated that there is no evidence that paperboard cartons will cease to be used in Minnesota. *Ibid.*

We find the State's approach fully supportable under our precedents. This Court has made clear that a legislature need not "strike at all evils at the same time or in the same way," *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 610 (1935), and that a legislature "may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *New Orleans* v. *Dukes*, 427 U. S., at 303. See also *Katzenbach* v. *Morgan*, 384 U. S. 641, 657 (1966); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110 (1949). The Equal Protection Clause does not deny the State of Minnesota the authority to ban one type of milk container conceded to cause environmental problems, merely because another type, already established in the market, is permitted to continue in use. Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.

Second, the State argues that its ban on plastic nonreturnable milk containers will reduce the economic dislocation foreseen from the movement toward greater use of environmentally superior containers. The State notes that plastic nonreturnables have only recently been introduced on a wide scale in Minnesota, and that, at the time the legislature was

considering the Act, many Minnesota dairies were preparing to invest large amounts of capital in plastic container production. As Representative Munger, chief sponsor of the bill in the House of Representatives, explained:

> "Minnesota's dairy market is on the verge of making a major change over from essentially a paperboard container system to a system of primarily single use, throwaway plastic bottles. The major dairies in our state have ordered the blow-mold equipment to manufacture in plant the non-returnable plastic milk bottle. Members of the House, I feel now is an ideal time for this legislation when only one dairy in our state is firmly established in manufacturing and marketing the throwaway plastic milk bottle." Transcript of the Debate of the Minnesota House of Representatives on H. F. 45, p. 2 (Mar. 10, 1977), reprinted as Plaintiffs' Exhibit J.

See also Transcript of the Full Senate Floor Discussion on H. F. 45, p. 6 (May 20, 1977), reprinted as Plaintiffs' Exhibit J (statement of Sen. Milton); *id.*, at 9 (statement of Sen. Schaaf); *id.*, at 10–11 (statement of Sen. Perpich).

Moreover, the State explains, to ban both the plastic and the paperboard nonreturnable milk container at once would cause an enormous disruption in the milk industry because few dairies are now able to package their products in refillable bottles or plastic pouches. Thus, by banning the plastic container while continuing to permit the paperboard container, the State was able to prevent the industry from becoming reliant on the new container, while avoiding severe economic dislocation.

The Minnesota Supreme Court did not directly address this justification, but we find it supported by our precedents as well. In *New Orleans* v. *Dukes, supra,* we upheld a city regulation banning pushcart food vendors, but exempting from the ban two vendors who had operated in the city for over eight years. Noting that the "city could reasonably decide

that newer businesses were less likely to have built up substantial reliance interests in continued operation," we held that the city "could rationally choose initially to eliminate vendors of more recent vintage." *Id.*, at 305. Accord, *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4, 6 (1970). This case is not significantly different. The state legislature concluded that nonreturnable, nonrefillable milk containers pose environmental hazards, and decided to ban the most recent entry into the field. The fact that the legislature in effect "grandfathered" paperboard containers, at least temporarily, does not make the Act's ban on plastic nonreturnables arbitrary or irrational.

Third, the State argues that the Act will help to conserve energy. It points out that plastic milk jugs are made from plastic resin, an oil and natural gas derivative, whereas paperboard milk cartons are primarily composed of pulpwood, which is a renewable resource. This point was stressed by the Act's proponents in the legislature. Senator Luther commented: "We have been through an energy crisis in Minnesota. We know what it is like to go without and what we are looking at here is a total blatant waste of petroleum and natural gas . . . ." Transcript of the Full Senate Floor Discussion on H. F. 45, p. 12 (May 20, 1977), reprinted as Plaintiffs' Exhibit J. Representative Munger said in a similar vein:

> "A sweep to the plastic throwaway bottle in the gallon size container alone would use enough additional natural gas and petroleum to heat 3,100 homes each year in Minnesota when compared to a refillable system and 1,400 compared to the present paperboard system. Plastic containers are made from a non-renewable resource while the paperboard is made from Minnesota's forest products." Transcript of the Debate of the Minnesota House of Representatives on H. F. 45, p. 2 (Mar. 10, 1977), reprinted as Plaintiffs' Exhibit J.

The Minnesota Supreme Court held, in effect, that the legislature misunderstood the facts. The court admitted that the results of a reliable study [9] support the legislature's conclusion that less energy is consumed in the production of paperboard containers than in the production of plastic nonreturnables, but, after crediting the contrary testimony of respondents' expert witness and altering certain factual assumptions,[10] the court concluded that "production of plastic nonrefillables requires less energy than production of paper containers." 289 N. W. 2d, at 85.

The Minnesota Supreme Court may be correct that the Act is not a sensible means of conserving energy. But we reiterate that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson* v. *Skrupa*, 372 U. S. 726, 729 (1963). Since in view of the evidence before the legislature, the question clearly is "at least debatable," *United States* v. *Carolene Products Co.*, 304 U. S., at 154, the Minnesota Supreme Court erred in substituting its judgment for that of the legislature.

Fourth, the State argues that the Act will ease the State's solid waste disposal problem. Most solid consumer wastes in Minnesota are disposed of in landfills. A reputable study before the Minnesota Legislature indicated that plastic milk jugs occupy a greater volume in landfills than other nonreturnable milk containers.[11] This was one of the legislature's major concerns. For example, in introducing the bill to the House of Representatives, Representative Munger asked rhe-

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[9] See n. 5, *supra*.

[10] The court adopted the higher of two possible measurements of energy consumption from paperboard production, apparently because the lower figure contemplated the use of waste products, such as sawdust, for energy production. In addition, the court substituted a lower measurement of the energy consumption from plastic nonreturnable production for that used in the study. 289 N. W. 2d, at 84–85.

[11] This was the conclusion of the Midwest Research Institute study, see n. 5, *supra*. Brief for Petitioner 21.

torically: "Why do we need this legislation?" Part of his answer to the query was that "the plastic non-refillable containers will increase the problems of solid waste in our state." Transcript of the Debate of the Minnesota House of Representatives on H. F. 45, p. 1 (Mar. 10, 1977), reprinted as Plaintiffs' Exhibit J.

The Minnesota Supreme Court found that plastic milk jugs in fact take up less space in landfills and present fewer solid waste disposal problems than do paperboard containers. 289 N. W. 2d, at 82–85. But its ruling on this point must be rejected for the same reason we rejected its ruling concerning energy conservation: it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.

We therefore conclude that the ban on plastic nonreturnable milk containers bears a rational relation to the State's objectives, and must be sustained under the Equal Protection Clause.[12]

III

The District Court also held that the Minnesota statute is unconstitutional under the Commerce Clause [13] because it imposes an unreasonable burden on interstate commerce.[14] We cannot agree.

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[12] The District Court also held that the Act violated substantive due process, and was apparently affirmed by the State Supreme Court on this ground. Conclusion of Law No. 1, App. A–23; 289 N. W. 2d, at 87, n. 20. From our conclusion under equal protection, however, it follows *a fortiori* that the Act does not violate the Fourteenth Amendment's Due Process Clause. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124–125 (1978); *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963).

[13] "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U. S. Const., Art. I, § 8, cl. 3.

[14] The Minnesota Supreme Court did not reach the Commerce Clause issue. 289 N. W. 2d, at 87, n. 20. The parties and *amici* have fully briefed and argued the question, and because of the obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause, we will reach

When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 36 (1980); *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 767 (1945). If a state law purporting to promote environmental purposes is in reality "simple economic protectionism," we have applied a "virtually *per se* rule of invalidity." *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978).[15] Even if a statute regulates "evenhandedly," and imposes only "incidental" burdens on interstate commerce, the courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Ibid.*

Minnesota's statute does not effect "simple protectionism," but "regulates evenhandedly" by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the contain-

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and decide the question. See *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 583, n. 24 (1979).

[15] A court may find that a state law constitutes "economic protectionism" on proof either of discriminatory effect, see *Philadelphia* v. *New Jersey*, or of discriminatory purpose, see *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S., at 352–353. Respondents advance a "discriminatory purpose" argument, relying on a finding by the District Court that the Act's "actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." App. A–19. We have already considered and rejected this argument in the equal protection context, see n. 7, *supra*, and do so in this context as well.

ers, or the sellers are from outside the State. This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down. *E. g., Lewis* v. *BT Investment Managers, Inc., supra* (Florida statutory scheme prohibiting investment advisory services by bank holding companies with principal offices out of the State); *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (Oklahoma statute prohibiting the export of natural minnows from the State); *Philadelphia* v. *New Jersey, supra* (New Jersey statute prohibiting importation of solid and liquid wastes into the State); *Hunt* v. *Washington Apple Advertising Comm'n, supra* (North Carolina statute imposing additional costs on Washington, but not on North Carolina, apple shippers).

Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc., supra*, at 142. We conclude that it is not.

The burden imposed on interstate commerce by the statute is relatively minor. Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of containers,[16] the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight. See *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 184 (1935). Within Minnesota, business will presumably shift from manufacturers of plastic nonreturnable containers to producers of paperboard cartons, refillable bot-

[16] Respondent Wells Dairy, an Iowa firm, sells 60% of its milk in plastic nonreturnable containers, and the remainder in other types of packages, including paperboard cartons. Tr. 419, 426, 439. The Chairman of the Board of respondent Marigold Foods, Inc., a Minnesota dairy, admitted at trial that his firm would continue to sell milk in plastic nonreturnable containers in other States, despite the passage of the Act. *Id.*, at 474.

tles, and plastic pouches, but there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms. Indeed, two of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation are Minnesota firms.[17]

Pulpwood producers are the only Minnesota industry likely to benefit significantly from the Act at the expense of out-of-state firms. Respondents point out that plastic resin, the raw material used for making plastic nonreturnable milk jugs, is produced entirely by non-Minnesota firms, while pulpwood, used for making paperboard, is a major Minnesota product. Nevertheless, it is clear that respondents exaggerate the degree of burden on out-of-state interests, both because plastics will continue to be used in the production of plastic pouches, plastic returnable bottles, and paperboard itself, and because out-of-state pulpwood producers will presumably absorb some of the business generated by the Act.

Even granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems, which we have already reviewed in the context of equal protection analysis. See *supra*, at 465–470. We find these local benefits ample to support Minnesota's decision under the Commerce Clause. Moreover, we find that no approach with "a lesser impact on interstate activities," *Pike* v. *Bruce Church, Inc.*, *supra*, at 142, is available. Respondents have suggested several alternative statutory schemes, but these alternatives are either more burdensome on commerce than the Act (as, for example, banning all nonreturnables) or less likely to be effective (as, for ex-

[17] See n. 1, *supra*. The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse. *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 187 (1938).

ample, providing incentives for recycling). See Brief for Respondents 32–33.

In *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978), we upheld a Maryland statute barring producers and refiners of petroleum products—all of which were out-of-state businesses—from retailing gasoline in the State. We stressed that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.*, at 127–128. A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause.

The judgment of the Minnesota Supreme Court is

Reversed.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

JUSTICE POWELL, concurring in part and dissenting in part.

The Minnesota statute at issue bans the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permits such sale in paperboard milk cartons. Respondents challenged the validity of the statute under both the Equal Protection and Commerce Clauses. The Minnesota District Court agreed with respondents on both grounds. The Supreme Court of Minnesota also agreed that the statute violated the Equal Protection Clause, but found it unnecessary to reach the Commerce Clause issue.

This Court today reverses the Supreme Court of Minnesota, finding no merit in either of the alleged grounds of invalidity. I concur in the view that the statute survives equal protection challenge, and therefore join the judgment of reversal on this

ground. I also agree with most of Parts I and II of the Court's opinion.

I would not, however, reach the Commerce Clause issue, but would remand it for consideration by the Supreme Court of Minnesota. The District Court expressly found:

> "12. Despite the purported policy statement published by the legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." App. to Pet. for Cert. A–24.

At a subsequent point in its opinion, and in even more explicit language, the District Court reiterated its finding that the purpose of the statute related to interstate commerce.[1] These findings were highly relevant to the question whether the statute discriminated against interstate commerce. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978) ("The crucial inquiry . . . must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental"). Indeed, the trial court's findings normally would require us to conclude that the Minnesota Legislature was engaging in such discrimination, as they were not rejected by the Minnesota Supreme Court. That court simply invalidated the statute on equal protection grounds, and had no reason to consider the claim of discrimination against interstate commerce.

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[1] Finding 23 of the District Court was as follows:

"23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, *actual bases were to isolate from interstate competition* the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268." App. to Pet. for Cert. A–27 (emphasis added).

The Minnesota Supreme Court did accept the *avowed* legislative purpose of the statute. It stated: "The Act is intended to promote the policies stated in Minn. St. 116F.01; therefore it is intended to promote the state interests of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream." 289 N. W. 2d 79, 82 (1979). The Court today reads this statement as an implied rejection of the trial court's specific finding that the "actual [purpose] was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests" of the nonresident dairy and plastics industry. In my view, however, the Minnesota Supreme Court was merely assuming that the statute was intended to promote its stated purposes. It was entirely appropriate for that court to accept, for purposes of equal protection analysis, the purpose expressed in the statute. See *ante*, at 463, n. 7. When the court did so, however, there is no reason to conclude that it intended to express or imply any view on any issue it did not consider. In drawing its conclusions, the court included no discussion whatever of the Commerce Clause issue and, certainly, no rejection of the trial court's express and repeated findings concerning the legislature's actual purpose.[2]

I conclude therefore that this Court has no basis for *inferring* a rejection of the quite specific factfindings by the trial court. The Court's decision today, holding that Chapter 268 does not violate the Commerce Clause, is flatly contrary

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[2] Commerce Clause analysis differs from analysis under the "rational basis" test. Under the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext. See *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951) ("A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods").

to the only relevant specific findings of fact. Although we are not *barred* from reaching the Commerce Clause issue, in doing so we also act without the benefit of a decision by the highest court of Minnesota on the question. In these circumstances, it is both unnecessary, and in my opinion inappropriate, for this Court to decide the Commerce Clause issue. See, *e. g.*, *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 542 (1960); *United States* v. *Ballard*, 322 U. S. 78, 88 (1944). Because no reason has been offered for a departure from our customary restraint, I would remand the case with instructions to consider specifically whether the statute discriminated impermissibly against interstate commerce.

JUSTICE STEVENS, dissenting.

While the Court in this case seems to do nothing more than apply well-established equal protection and Commerce Clause principles to a particular state statute, in reality its reversal of the Minnesota Supreme Court is based upon a newly discovered principle of federal constitutional law. According to this principle, which is applied but not explained by the majority, the Federal Constitution defines not only the relationship between Congress and the federal courts, but also the relationship between state legislatures and state courts. Because I can find no support for this novel constitutional doctrine in either the language of the Federal Constitution or the prior decisions of this Court, I respectfully dissent.

I

The keystone of the Court's equal protection analysis is its pronouncement that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Ante*, at 470.[1] If the pronouncement concerned

[1] See also *ante*, at 464, where the Court states that "States are not required to convince the courts of the correctness of their legislative judgments"; and *ibid.*, where the Court states that "litigants may not pro-

the function of *federal* courts, it would be amply supported by reason and precedent. For federal tribunals are courts of limited jurisdiction, whose powers are confined by the Federal Constitution, by statute, and by the decisions of this Court. It is not surprising, therefore, that the Court's pronouncement is supported by citation only to precedents dealing with the function that a *federal* court may properly perform when it is reviewing the constitutionality of a law enacted by Congress or by a state legislature.[2]

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cure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken."

[2] The majority cites *Vance* v. *Bradley*, 440 U. S. 93 (1979); *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952); *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938); and *Henderson Co.* v. *Thompson*, 300 U. S. 258 (1937), in support of its conclusion that it is not the function of the Minnesota courts to re-evaluate facts considered by the Minnesota Legislature. See *ante*, at 464, 469. However, even a cursory examination of these cases reveals that they provide no support for the Court's decision in this case.

In four of the cited cases, the Court reviewed the actions of lower federal, not state, courts. These cases thus shed no light upon the role a state court properly may play in reviewing actions of the state legislature. In *Vance* v. *Bradley* and *United States* v. *Carolene Products*, Federal District Courts had invalidated federal statutes on federal constitutional grounds. In both cases, this Court reversed because the District Courts had exceeded the scope of their powers by re-evaluating the factual bases for the congressional enactments. See *Vance*, *supra*, at 111–112; *Carolene Products*, *supra*, at 152, 154. In *Ferguson* v. *Skrupa*, a Federal District Court had invalidated a Kansas statute on federal constitutional grounds. This Court reversed, finding that the District Court had exceeded constitutional limitations by substituting its judgment for that of the Kansas Legislature. See 372 U. S., at 729–731. The Court also indicated in *Ferguson* that its own power to supervise the actions of state legislatures is narrowly circumscribed. *Id.*, at 730–731. Finally, in *Henderson Co.* v. *Thompson*, a Federal District Court had sustained a Texas statute in the face of a constitutional challenge. In affirming that decision, the Court simply observed that "[t]he needs of conservation are to be determined by the Legislature." 300 U. S., at 264.

In only one of the cases cited by the majority did the Court review a state-court judgment. In *Day-Brite Lighting, Inc.* v. *Missouri*, a

But what is the source—if indeed there be one—of this Court's power to make the majestic announcement that it is not the function of a *state court* to substitute its evaluation of legislative facts for that of a state legislature? I should have thought the allocation of functions within the structure of a state government would be a matter for the State to determine. I know of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts.[3]

Missouri statute was challenged on due process, equal protection, and Contract Clause theories. The Missouri Supreme Court had upheld the statute, and this Court affirmed. In the course of its opinion, the Court stated that it was not free to re-evaluate the legislative judgment or act as "a superlegislature." 342 U. S., at 423, 425. The Court did not comment at all upon the extent of the Missouri Supreme Court's authority to supervise the activities of the Missouri Legislature. Nothing in the *Day-Brite Lighting* opinion can be construed as the source of the Court's newly found power to determine for the States which lawmaking powers may be allocated to their courts and which to their legislatures.

[3] Responding to an argument that the lawmaking power of the Virginia Legislature had been improperly assigned to another arm of the State's government, Justice Cardozo, writing for the Court in *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 612–613 (1937), stated:

"The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. IV, § 4. Even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the courts. *Pacific States Telephone Co.* v. *Oregon*, 223 U. S. 118; *Davis* v. *Hildebrant*, 241 U. S. 565; *Ohio ex rel. Bryant* v. *Akron Park District*, 281 U. S. 74, 79, 80. Cases such as *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, cited by appellants, are quite beside the point. What was in controversy there was the distribution of power between President and Congress, or between Congress and administrative officers or commissions, a controversy affecting the structure of the na-

Nor is there anything in the Federal Constitution that prevents a state court from reviewing factual determinations made by a state legislature or any other state agency.[4] If a state statute expressly authorized a state tribunal to sit as a Council of Revision with full power to modify or to amend

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tional government as established by the provisions of the national constitution.

"So far as the objection to delegation is founded on the Constitution of Virginia, it is answered by a decision of the highest court of the state. In *Reynolds* v. *Milk Commission*, 163 Va. 957; 179 S. E. 507, the Supreme Court of Appeals passed upon the validity of the statute now in question. . . . A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere." See also *Dreyer* v. *Illinois*, 187 U. S. 71, 83–84 (1902); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 256–257 (1957) (Frankfurter, J., concurring in result).

[4] In *Ferguson* v. *Skrupa*, *supra*, the Court indicated that the Federal Constitution does prevent the federal courts from reviewing factual determinations made by a state legislature. In rejecting the substantive due process cases of an earlier era, the Court stated:

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." 372 U. S., at 729.

The Court went on to explain this constitutional limitation:

"We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'" *Id.*, at 730 (footnote omitted).

The Court's conclusion in *Ferguson* that the Constitution imposes limitations upon the power of the federal courts to review legislative judgments was clearly correct and was consistent with the structure of the Federal Constitution and "the system of government created" therein. The Constitution defines the relationship among the coordinate branches of the Federal Government and prescribes for each branch certain limited powers. The Federal Constitution, however, is silent with respect to the powers of the coordinate branches of state governments and the relationship among those branches.

the work product of its legislature, that statute would not violate any federal rule of which I am aware. The functions that a state court shall perform within the structure of state government are unquestionably matters of state law.

One of the few propositions that this Court has respected with unqualified consistency—until today—is the rule that a federal court is bound to respect the interpretation of state law announced by the highest judicial tribunal in a State.[5] In this case, the Minnesota Supreme Court has held that the state trial court acted properly when it reviewed the factual basis for the state legislation, and implicitly the Minnesota Supreme Court also has held that its own review of the legislative record was proper. Moreover, it also has determined as a matter of state law how it properly should resolve conflicts in the evidence presented to the state legislature, as supplemented by the additional evidence presented to the trial court in this case.[6] In my opinion, the factual conclu-

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[5] Although this proposition is so well established as to require no citation of authority, abundant authority is readily available. See, *e. g.*, *North Carolina* v. *Butler*, 441 U. S. 369, 376, n. 7 (1979); *Ward* v. *Illinois*, 431 U. S. 767, 772 (1977); *Eastlake* v. *Forest City Enterprises, Inc.*, 426 U. S. 668, 674, n. 9 (1976); *Hortonville Joint School District No. 1* v. *Hortonville Education Assn.*, 426 U. S. 482, 488 (1976); *Mullaney* v. *Wilbur*, 421 U. S. 684, 691 (1975); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 256 (1974); *Wardius* v. *Oregon*, 412 U. S. 470, 477 (1973); *Groppi* v. *Wisconsin*, 400 U. S. 505, 507 (1971).

[6] In its memorandum in this case, the state trial court initially observed that it was not free to "substitute its judgment for that of the legislature as to the wisdom or desirability of the act." App. A–24. With respect to the facts considered by the legislature, however, the trial court found that "as fact-finder, [it was] obliged to weigh and evaluate this evidence, much of which was in sharp conflict." *Id.*, at A–25.

In its opinion affirming the trial court's decision, the Minnesota Supreme Court took a similar view of the function to be performed by the Minnesota courts when reviewing Minnesota legislation:

"We are aware of the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds. Nevertheless, our inquiry into the constitutional propriety of the present

sions drawn by the Minnesota courts concerning the deliberations of the Minnesota Legislature are entitled to just as much deference as if they had been drafted by the state legislature itself and incorporated in a preamble to the state statute. The State of Minnesota has told us in unambiguous language that this statute is not rationally related to any environmental objective; it seems to me to be a matter of indifference, for purposes of applying the federal Equal Protection Clause, whether that message to us from the State of Minnesota is conveyed by the State Supreme Court, or by the state legislature itself.

I find it extraordinary that this federal tribunal feels free to conduct its own *de novo* review of a state legislative record in search of a rational basis that the highest court of the State has expressly rejected. There is no precedent in this Court's decisions for such federal oversight of a State's lawmaking process.[7] Of course, if a federal trial court had reviewed the

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classification separating paper containers from plastic nonrefillables is dependent upon facts. Based upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives." 289 N. W. 2d 79, 82 (1979).

[7] In its footnote 6, *ante*, at 461–463, the Court takes issue with my suggestion that its action in this case is unprecedented by citing four cases in which the Court reversed State Supreme Court decisions invalidating provisions of state law on federal equal protection grounds. See *Idaho Dept. of Employment* v. *Smith*, 434 U. S. 100 (1977) (*per curiam*); *Arlington County Board* v. *Richards*, 434 U. S. 5 (1977) (*per curiam*); *Richardson* v. *Ramirez*, 418 U. S. 24 (1974); *Lehnhausen* v. *Lake Shore Auto Parts*, 410 U. S. 356 (1973). In each of those cases, however, this Court concluded that the state court had applied an incorrect legal standard; in none did this Court reassess the factual predicate for the state-court decision.

In *Idaho Dept. of Employment*, the Idaho Supreme Court had invalidated a statutory classification, not because it generally failed to further legitimate state goals, but rather because the court had found that the classification was imperfect since some members of the class denied

factual basis for a state law, conflicts in the evidence would have to be resolved in favor of the State.[8] But when a state court has conducted the review, it is not our business to dis-

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unemployment benefits were in fact as available for full-time employment as members of the class entitled to benefits under the Idaho statute. See *Smith* v. *Department of Employment*, 98 Idaho 43, 43–44, 557 P. 2d 637, 637–638 (1976), citing *Kerr* v. *Department of Employment*, 97 Idaho 385, 545 P. 2d 473 (1976). This Court did not disagree with the Idaho court's finding that the classification was imperfect, but merely held that this imperfection was legally insufficient to invalidate the statute under the Equal Protection Clause. 434 U. S., at 101–102. In *Arlington County Board* v. *Richards*, the Virginia Supreme Court had recognized the rational-basis test as the appropriate equal protection standard, but then had proceeded to apply a more stringent standard to the municipal ordinance at issue. The court had expressly noted that the municipal ordinance "may relieve the [parking] problems" to which it was directed. However, the court concluded that the means employed by the county to deal with these problems—a classification based upon residency—created an unconstitutional "invidious discrimination." See *Arlington County Board* v. *Richards*, 217 Va. 645, 651, 231 S. E. 2d 231, 235 (1977). This Court reversed, rejecting the conclusion that the ordinance's residency classification resulted in an invidious discrimination. 434 U. S., at 7. In *Richardson* v. *Ramirez*, a voting rights case, the California Supreme Court was reversed, not because it had re-examined the factual determinations of the California Legislature, but because this Court found that the statutory discrimination at issue was expressly authorized by § 2 of the Fourteenth Amendment. 418 U. S., at 41–56. Finally, in *Lake Shore Auto Parts* v. *Lehnhausen*, the Illinois Supreme Court had held, in essence, that a classification used in determining liability for a property tax must, as a constitutional matter, be based upon the nature of the property at issue, and not upon the corporate or noncorporate character of the property's owner See *Lake Shore Auto Parts* v. *Korzen*, 49 Ill. 2d 137, 149–151, 273 N. E. 2d 592, 598–599 (1971) This Court rejected this principle, finding it inconsistent with prior decisions clearly establishing that distinctions between individuals and corporations in tax legislation violated no constitutional rights. 410 U. S., at 359–365.

As the majority observes, the Court in each of these cases reversed the state-court decisions because the state courts had applied an equal protection standard more stringent than that sanctioned by this Court. Quite frankly, in my opinion it would have been sound judicial policy

[*Footnote 8 is on p. 484*]

agree with the state tribunal's evaluation of the State's own lawmaking process. Even if the state court should tell us that a state statute has a meaning that we believe the state

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in all four of those cases to allow the state courts to accord even greater protection within their respective jurisdictions than the Federal Constitution commands. See my dissent in *Idaho Dept. of Employment*, *supra*, at 104. But what is especially relevant here is the fact that in none of those cases had the state courts found, after a full evidentiary hearing, that the factual predicate for the state law at issue was simply not true. The Minnesota courts in this case made such a finding after the development of an extensive record. The Minnesota courts then applied the correct federal legal standard to the facts revealed by this record and concluded that the statutory classification was not rationally related to a legitimate state purpose. As I read the cases cited by the majority, they are simply inapposite in this case. My own research has uncovered no instance in which the Court has reversed the decision of the highest court of a State, as it does in this case, because the state court exceeded some federal constitutional limitation upon its power to review the factual determinations of the state legislature. The Court has never before, to my knowledge, undertaken to define, as a matter of federal law, the appropriate relationship between a state court and a state legislature.

[8] In most of the cases in which the Court has indicated that courts may not substitute their judgment for that of the legislature, the Court was reviewing decisions of the lower federal courts. See, *e. g.*, *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 812 (1976); *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4, 6 (1970) (*per curiam*); *Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S. 129, 136, 138–139 (1968); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955); *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604, 618–619 (1950); *Daniel* v. *Family Insurance Co.*, 336 U. S 220, 224 (1949); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 594 (1939); *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 190–191 (1938); *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 427–428, 430 (1936); *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 263 (1936); *Sproles* v. *Binford*, 286 U. S. 374, 388–389 (1932); *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584, 586 (1929); *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303 (1919). In those instances in which the Court was reviewing state-court decisions, its statements with respect to the limited role of the judiciary in reviewing state

legislature plainly did not intend, we are not free to take our own view of the matter.[9]

Once it is recognized that this Court may not review the question of state law presented by the Minnesota courts' decision to re-evaluate the evidence presented to the legislature, the result we must reach in this case is apparent. Because the factual conclusions drawn by the Minnesota courts are clearly supported by the record,[10] the only federal issue that this case presents is whether a discriminatory statute that is

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legislation clearly concerned its own authority to act as a "superlegislature," not the authority of a state court to do so where permitted by state law. See, *e. g., Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124 (1978); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 109 (1949); *Olsen* v. *Nebraska*, 313 U. S. 236, 246 (1941); *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328 (1927); *Cusack Co.* v. *Chicago*, 242 U. S. 526, 531 (1917); *Hadacheck* v. *Los Angeles*, 239 U. S 394, 413–414 (1915); *Price* v. *Illinois*, 238 U. S. 446, 452–453 (1915); *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365 (1910).

[9] This Court will defer to the interpretation of state law announced by the highest court of a State even where a more reasonable interpretation is apparent, see, *e. g., O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974), a contrary construction might save a state statute from constitutional invalidity, see, *e. g., Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 837, n. 9 (1978), or it appears that the state court has attributed an unusually inflexible command to its legislature, see, *e. g., Kingsley Pictures Corp.* v *Regents*, 360 U. S. 684, 688–689 (1959).

[10] As the majority notes, the evidence considered by the Minnesota courts was conflicting, *ante*, at 460, 464, 469, and the respondents "produced impressive supporting evidence at trial" indicating that the decision of the Minnesota Legislature was factually unsound. *Ante*, at 463. In light of this record, this Court clearly cannot reverse the concurrent factual findings of two state courts.

Moreover, since there is no significant difference between plastic containers and paper containers in terms of environmental impact, and since no one contends that the Minnesota statute will reduce the consumption of dairy products, it is not difficult to understand the state judges' skeptical scrutiny of a legislative ban on the use of one kind of container without imposing any present or future restriction whatsoever on the use of the other.

admittedly irrational violates the Equal Protection Clause of the Fourteenth Amendment. The Court implicitly acknowledges that the Minnesota Supreme Court applied the proper rule of federal law when it answered that question.[11] Whatever we may think about the environmental consequences of this discriminatory law, it follows inexorably that it is our duty as federal judges to affirm the judgment of the Minnesota Supreme Court.

II

In light of my conclusion that the Minnesota Supreme Court's equal protection decision must be affirmed, I need not address the Commerce Clause question resolved by the majority. *Ante*, at 470–474. Nonetheless, I believe that the majority's treatment of that question compels two observations.

First, in my opinion the Court errs in undertaking to decide the Commerce Clause question at all. The state trial court addressed the question and found that the statute was designed by the Minnesota Legislature to promote the economic interests of the local dairy and pulpwood industries at the expense of competing economic groups.[12] On appeal, the

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[11] It is true that the Court carefully avoids an express acknowledgment that the Minnesota Supreme Court applied the correct legal standard. Not one word in the Court's opinion, however, suggests that the Court has any disagreement with the state court's understanding of the proper federal rule.

[12] The trial court made the following findings of fact:

"12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.

. . . . . .

"23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be

Minnesota Supreme Court expressly declined to consider this aspect of the trial court's decision, and accordingly made no comment at all upon the merits of the Commerce Clause question. 289 N. W. 2d 79, 87, n. 20 (1979). Generally, when reviewing state-court decisions, this Court will not decide questions which the highest court of a State has properly declined to address. The majority offers no persuasive explanation for its unusual action in this case.[13] In the absence

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promoted without the remedies prescribed in Chapter 268." App. A–19, A–22.

These findings were repeated in the memorandum filed by the trial court in this case:

"The relevant legislative history of Chapter 268 support [*sic*] a conclusion that the real basis for it was to serve certain economic interests (paper, pulpwood, and some dairies) at the expense of other competing economic groups (plastic and certain dairies) by prohibiting the plastic milk bottle." *Id.*, at A–24.

[13] According to the majority, its decision to address the Commerce Clause question is justified "because of the obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause." *Ante*, at 470, n. 14. The majority cites *New York City Transit Authority* v. *Beazer*, 440 U. S. 568 (1979), in support of this rationale. This justification is inadequate, in my opinion, for two reasons.

First, in light of the trial court's factual finding that the Minnesota Legislature enacted the statute for protectionist, rather than environmental, reasons, see n. 12, *supra*, the Equal Protection Clause and Commerce Clause inquiries are not necessarily as similar as the Court suggests. As the majority acknowledges, if a state law which purports to promote environmental goals is actually protectionist in design, a virtually automatic rule of invalidity, not a balancing-of-interests test, is applied. See *ante*, at 471. See also *New Orleans* v. *Dukes*, 427 U. S., at 304, n. 5.

Second, in *Beazer* the Court reviewed the decision of a lower federal court, not a state supreme court. While this Court, in its discretion, may elect to deprive lower federal courts of the opportunity to decide particular statutory questions, it seems to me that respect for the Minnesota Supreme Court as the highest court of a sovereign State dictates that we not casually divest it of authority to decide a constitutional question on which it properly declined to comment when this case was first before it. Such deference is especially appropriate here because the Court's analysis of

of some substantial justification for this action, I would not deprive the Minnesota Supreme Court of the first opportunity to review this aspect of the decision of the Minnesota trial court.

Second, the Court's Commerce Clause analysis suffers from the same flaw as its equal protection analysis. The Court rejects the findings of the Minnesota trial court, not because they are clearly erroneous, but because the Court is of the view that the Minnesota courts are not authorized to exercise such a broad power of review over the Minnesota Legislature. See *ante*, at 471, n. 15. After rejecting the trial court's findings, the Court goes on to find that any burden the Minnesota statute may impose upon interstate commerce is not excessive in light of the substantial state interests furthered by the statute. *Ante*, at 473. However, the Minnesota Supreme Court expressly found that the statute is not rationally related to the substantial state interests identified by the majority.[14] Because I believe, as explained in Part I, *supra*, that the Court's intrusion upon the lawmaking process of the State of Minnesota is without constitutional sanction or precedential support, it is clear to me that the findings of the Minnesota Supreme Court must be respected by this Court. Accordingly, the essential predicate for the majority's conclusion that the "local benefits [are] ample to support Minnesota's decision under the Commerce Clause," *ante*, at 473, is absent.

III

The majority properly observes that a state court, when applying the provisions of the Federal Constitution, may not

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the Commerce Clause issue requires rejection of the state trial court's findings of fact.

[14] As noted in Part I, *supra*, the Court rejects the Minnesota Supreme Court's findings, not because they are without support in the record—they clearly are adequately supported, see n. 10, *supra*—but because it feels that the Minnesota Supreme Court was without authority to do anything other than endorse the factual conclusions of the Minnesota Legislature.

apply a constitutional standard more stringent than that announced in the relevant decisions of this Court. See *ante*, at 461–463, n. 6. It follows from this observation that a state court's decision invalidating state legislation on federal constitutional grounds may be reversed by this Court if the state court misinterpreted the relevant federal constitutional standard. In this case, however, the Minnesota Supreme Court applied the correct federal equal protection standard and properly declined to consider the Commerce Clause. The majority reverses this decision because it disagrees with the Minnesota courts' perception of their role in the State's lawmaking process, not because of any error in the application of federal law. In my opinion, this action is beyond the Court's authority. I therefore respectfully dissent.

FEDORENKO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-5602. Argued October 15, 1980—Decided January 21, 1981

The Displaced Persons Act of 1948 (DPA) enabled European refugees driven from their homelands by World War II to emigrate to the United States without regard to traditional immigration quotas. It provided that any person "who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States," and the applicable definition of "displaced persons" specifically excluded individuals who had "assisted the enemy in persecuting civil[ians]" or had "voluntarily assisted the enemy forces" in their operations. Petitioner was admitted to the United States under a DPA visa that had been issued on the basis of his 1949 application which misrepresented his wartime activities and concealed the fact that after being captured by the Germans while serving in the Russian Army, he had served as an armed guard at the Nazi concentration camp at Treblinka in Poland. Subsequently, he became an American citizen in 1970 on the basis of his visa papers and his naturalization application which also did not disclose his wartime service as a concentration camp guard. The Government thereafter brought this denaturalization action under § 340 (a) of the Immigration and Nationality Act of 1952, which requires revocation of United States citizenship that was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." The Government charged that petitioner, in applying for his DPA visa and for citizenship, had willfully concealed that he had served as an armed guard at Treblinka and had committed crimes against inmates of the camp because they were Jewish, and that therefore he had procured his naturalization illegally or by willfully misrepresenting material facts. The Government presented witnesses who testified that they had seen petitioner commit acts of violence against camp inmates, and an expert witness in the interpretation and application of the DPA, who testified that petitioner would have been found ineligible for a visa as a matter of law if it had been determined that he had been an armed guard at the camp, regardless of whether or not he had volunteered for service or had committed atrocities against inmates. In his testimony, petitioner admitted that he deliberately gave false information in connection with

his application for the DPA visa, but claimed that he had been forced to serve as a guard and denied any personal involvement in the atrocities committed at the camp. The District Court entered judgment for petitioner, finding, *inter alia*, that although petitioner had lied about his wartime activities when he applied for a visa in 1949, he had been forced to serve as a guard and the Government had not met its burden of proving that he had committed war crimes or atrocities at Treblinka. The court held that because disclosure of petitioner's involuntary service as a concentration camp guard would not have been grounds for denial of citizenship, his false statements about his wartime activities were not misrepresentations of "material facts" within the meaning of the denaturalization statute under the materiality standard announced in *Chaunt* v. *United States*, 364 U. S. 350. As an alternative basis for its decision, the court held that even assuming misrepresentation of material facts, equitable and mitigating circumstances—the inconclusiveness of the evidence that petitioner had committed war crimes or atrocities and the uncontroverted evidence that he had been responsible and law-abiding since coming to the United States—required that he be permitted to retain his citizenship. The Court of Appeals reversed, holding that the District Court had misinterpreted the *Chaunt* test and that it had no discretion to enter judgment for petitioner in the face of a finding that he had procured his naturalization by willfully concealing material facts.

Held: Petitioner's citizenship must be revoked under § 340 (a) of the Immigration and Nationality Act because it was "illegally procured." Pp. 505–518.

(a) The Government carries a heavy burden of proof in a denaturalization proceeding, and evidence justifying revocation of citizenship must be clear, unequivocal, and convincing, and not leave the issue in doubt. However, there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. Pp. 505–507.

(b) The DPA's prohibition against admission of any person "who shall willfully make a misrepresentation" to gain admission into the United States as an "eligible displaced person," only applies to willfull misrepresentations about "material facts." Under the analysis of the courts below, the misrepresentation that raised the materiality issue in this case was contained in petitioner's application for a visa. The plain language of the definition of "displaced persons" for purposes of the DPA as excluding individuals who "assisted the enemy in persecuting

civil[ians]" mandates the literal interpretation, rejected by the District Court, that an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa. Since a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa, and since disclosure of the true facts here would, as a matter of law, have made petitioner ineligible for a visa, it is unnecessary to determine whether the materiality test of *Chaunt* as to applications for *citizenship* also applies to false statements in *visa* applications. Pp. 507–514.

(c) In 1970, when petitioner filed his petition for and was admitted to citizenship, the Immigration and Nationality Act required an applicant for citizenship to be lawfully admitted to the United States for permanent residence, which admission in turn required that the individual possess a valid unexpired immigrant visa. And under the law applicable at the time of petitioner's initial entry into the United States, a visa obtained through a material misrepresentation was not valid. Since petitioner thus failed to satisfy a statutory requirement which Congress had imposed as a prerequisite to the acquisition of citizenship by naturalization, his citizenship must be revoked because it was "illegally procured." Pp. 514–516.

(d) Although a denaturalization action is a suit in equity, a district court lacks equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts. Once a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct. Pp. 516–518.

597 F. 2d 946, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., concurred in the judgment. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 518. WHITE, J., *post*, p. 526, and STEVENS, J., *post*, p. 530, filed dissenting opinions.

Brian M. Gildea argued the cause and filed a brief for petitioner.

Attorney General Civiletti argued the cause for the United States. On the brief were *Solicitor General McCree, Assist-*

ant Attorney General Heymann, Deputy Solicitor General Geller, Allan A. Ryan, Jr., and *David B. Smith.**

JUSTICE MARSHALL delivered the opinion of the Court.

Section 340 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 8 U. S. C. § 1451 (a), requires revocation of United States citizenship that was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation."[1] The Government brought this denaturalization action, alleging that petitioner procured his citizenship illegally or by willfully misrepresenting a material fact. The District Court entered judgment for petitioner, but the Court of Appeals reversed and ordered entry of a judgment of denaturalization. We granted certiorari, 444 U. S. 1070, to resolve two questions: whether petitioner's failure to disclose, in his application for a visa to come to this country, that he had served during the Second World War as an armed guard at the Nazi concentration camp at Treblinka, Poland, rendered his citizenship revocable as "illegally procured" or procured by willful misrepresentation of a material fact, and if so, whether the District Court nonetheless possessed equitable discretion to refrain from entering judgment in favor of the Government under these circumstances.

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*Briefs of *amici curiae* urging affirmance were filed by *Phil Baum, Nathan Z. Dershowitz*, and *Marc D. Stern* for the American Jewish Congress et al.; and by *Harold P. Weinberger, Justin J. Finger, Jeffrey P. Sinensky*, and *Richard A. Weisz* for the Anti-Defamation League of B'nai B'rith et al.

[1] Title 8 U. S. C. § 1451 (a) provides in pertinent part:

"It shall be the duty of the United States attorneys . . . to institute proceedings . . . in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . ."

I

A

Petitioner was born in the Ukraine in 1907. He was drafted into the Russian Army in June 1941, but was captured by the Germans shortly thereafter. After being held in a series of prisoner-of-war camps, petitioner was selected to go to the German camp at Travnicki in Poland, where he received training as a concentration camp guard. In September 1942, he was assigned to the Nazi concentration camp at Treblinka in Poland, where he was issued a uniform and rifle and where he served as a guard during 1942 and 1943. The infamous Treblinka concentration camp was described by the District Court as a "human abattoir" at which several hundred thousand Jewish civilians were murdered.[2] After an armed uprising by the inmates at Treblinka led to the closure of the camp in August 1943, petitioner was transferred to a German labor camp at Danzig and then to the German prisoner-of-war camp at Poelitz, where he continued to serve as an armed guard. Petitioner was eventually transferred to Hamburg where he served as a warehouse guard. Shortly before the British forces entered that city in 1945, petitioner discarded his uniform and was able to pass as a civilian. For the next four years, he worked in Germany as a laborer.

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[2] Historians estimate that some 800,000 people were murdered at Treblinka. See L. Dawidowicz, The War Against the Jews, 1933–1945, p. 149 (1975); R. Hilberg, The Destruction of the European Jews 572 (1978).

The District Court described Treblinka in this manner:

"It contained only living facilities for the SS and the persons working there. The thousands who arrived daily on the trains had no need for barracks or mess halls: they would be dead before nightfall. It was operated with a barbarous methodology—brutally efficient—and such camps surely fill one of the darkest chapters in the annals of human existence, certainly the darkest in that which we call Western civilization." 455 F. Supp. 893, 901, n. 12 (SD Fla. 1978).

B

In 1948, Congress enacted the Displaced Persons Act (DPA or Act), 62 Stat. 1009, to enable European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas. The Act's definition of "displaced persons" [3] eligible for immigration to this country specifically excluded individuals who had "assisted the enemy in persecuting civil[ians]" or had "voluntarily assisted the enemy forces . . . in their operations . . . ." [4] Section 10 of the DPA, 62 Stat. 1013, placed the burden of proving eligibility under the Act on the person seeking admission and provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." The Act established an elaborate system for determining eligibility for displaced person status. Each applicant was first interviewed by representatives of the International Refugee Organization of the United Nations (IRO) who ascertained that the person was a refugee or displaced person.[5] The ap-

[3] The DPA incorporated the definition of "refugees or displaced persons" contained in Annex I to the Constitution of the International Refugee Organization of the United Nations (IRO). See § 2 (b), 62 Stat. 1009. The IRO Constitution, 62 Stat. 3037–3055, was ratified by the United States on December 16, 1946 (T. I. A. S. No. 1846) and became effective on August 20, 1948. See 62 Stat. 3037.

[4] The IRO Constitution provided that the following persons would not be eligible for refugee or displaced person status:

"1. War criminals, quislings and traitors.

"2. Any other persons who can be shown:

"(*a*) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

"(*b*) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." Annex I, Part II, 62 Stat. 3051–3052.

[5] The IRO was established in 1946 as a temporary specialized agency of the United Nations to deal with all aspects of the refugee problem in

plicant was then interviewed by an official of the Displaced Persons Commission,[6] who made a preliminary determination about his eligibility under the DPA. The final decision was made by one of several State Department vice consuls, who were specially trained for the task and sent to Europe to administer the Act.[7] Thereafter, the application was reviewed by officials of the Immigration and Naturalization Service (INS) to make sure that the applicant was admissible into the United States under the standard immigration laws.

In October 1949, petitioner applied for admission to the United States as a displaced person. Petitioner falsified his visa application by lying about his wartime activities. He told the investigators from the Displaced Persons Commission that he had been a farmer in Sarny, Poland, from 1937 until March 1942, and that he had then been deported to Germany and forced to work in a factory in Poelitz until the end of the war, when he fled to Hamburg.[8] Petitioner told the same

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postwar Europe. The IRO established and administered a network of camps and resettlement centers where the refugees were registered, housed, fed, and provided with medical care. Where possible, the IRO provided for the refugees' rehabilitation and training, arranged legal protection for as long as they were stateless, and negotiated agreements for resettlement. See generally L. Holborn, The International Refugee Organization: A Specialized Agency of The United Nations: Its History and Work 1946–1952 (1956).

[6] The DPA established a Displaced Persons Commission to oversee and administer the resettlement program envisaged by the Act. 62 Stat. 1012–1013.

[7] According to testimony presented at trial by one of the Government's witnesses who served as a vice consul, between 35 and 40 vice consuls were involved in administering the Act. Record 715. Each vice consul spent three months in training in Washington and was then sent to Europe where he received further training before he was put to work reviewing applications. *Id.*, at 711–712, 719–721, 723, 726–727.

[8] Petitioner also lied about his birthplace and nationality, claiming that he was born in Sarny, in Poland, when in fact he was born in Sivasch, in the Ukraine. App. 26. However, on November 21, 1950, after he arrived in this country, petitioner filed an Application for a Certificate of

story to the vice consul who reviewed his case and he signed a sworn statement containing these false representations as part of his application for a DPA visa. Petitioner's false statements were not discovered at the time and he was issued a DPA visa, and sailed to the United States where he was admitted for permanent residence. He took up residence in Connecticut and for three decades led an uneventful and law-abiding life as a factory worker.

In 1969, petitioner applied for naturalization at the INS office in Hartford, Conn. Petitioner did not disclose his wartime service as a concentration camp armed guard in his application,[9] and he did not mention it in his sworn testimony to INS naturalization examiners. The INS examiners took petitioner's visa papers at face value and recommended that his citizenship application be granted. On this recommendation, the Superior Court of New Haven County granted his petition for naturalization and he became an American citizen on April 23, 1970.

C

Seven years later, after petitioner had moved to Miami Beach and become a resident of Florida,[10] the Government filed this action in the United States District Court for the Southern District of Florida to revoke petitioner's citizenship. The complaint alleged that petitioner should have been deemed ineligible for a DPA visa because he had served as an armed guard at Treblinka and had committed crimes or atroc-

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Arrival and Preliminary Form for a Declaration of Intention in which he correctly listed his birthplace as Sivasch in the Ukraine. Petitioner again provided the correct information when he filed a similar form on April 7, 1951. 455 F. Supp., at 911.

[9] It should be noted that none of the questions in the application for citizenship explicitly required petitioner to disclose this information. Perhaps the most closely related question on the application form was one that required him to list his foreign military service. Petitioner indicated only that he had served in the Russian Army. App. 33.

[10] See 455 F. Supp., at 896, n. 3.

ities against inmates of the camp because they were Jewish. The Government charged that petitioner had willfully concealed this information both in applying for a DPA visa and in applying for citizenship, and that therefore petitioner had procured his naturalization illegally or by willfully misrepresenting material facts.[11]

The Government's witnesses at trial included six survivors of Treblinka who claimed that they had seen petitioner commit specific acts of violence against inmates of the camp.[12] Each witness made a pretrial identification of petitioner from a photo array that included his 1949 visa photograph, and three of the witnesses made courtroom identifications. The Government also called as a witness Kempton Jenkins, a career foreign service officer who served in Germany after the war as one of the vice consuls who administered the DPA. Jenkins had been trained to administer the Act and had re-

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[11] The complaint also charged that petitioner had deliberately made false statements for the purpose of securing his naturalization and had thereby failed to satisfy the statutory requirement of good moral character during the 5-year period immediately preceding the filing of his application for naturalization. See 8 U. S. C. § 1427 (a).

[12] One witness Eugeun Turowski, testified that he saw petitioner shoot and whip Jewish prisoners at the camp. Record 134–136. Another, Schalom Kohn, testified that he saw petitioner almost every day for the first few months Kohn was at Treblinka, *id.*, at 262–263, that petitioner beat him with an iron-tipped whip, and that he saw petitioner whip and shoot other prisoners. *Id.*, at 268, 271, 322–323. The third witness, Josef Czarny, claimed that he saw petitioner beat arriving prisoners, *id.*, at 434, and that he once saw him shoot a prisoner. *Id.*, at 435–442. Gustaw Boraks testified that he saw petitioner repeatedly chase prisoners to the gas chambers, beating them as they went. *Id.*, at 886–888. Boraks also claimed that on one occasion, he heard a shot and ran outside to see petitioner, with a gun drawn, standing close to a wounded woman who later told him that petitioner was responsible for the shooting. *Id.*, at 630–634. Sonia Lewkowicz testified that she saw petitioner shoot a Jewish prisoner. *Id.*, at 973, 1013–1015, 1039–1040. Finally, Pinchas Epstein testified that petitioner shot and killed a friend of his, after making him crawl naked on all fours. *Id.*, at 1056–1070.

viewed some 5,000 visa applications during his tour of duty. Record 711–714, 720–722. Without objection from petitioner, Jenkins was proffered by the Government and accepted by the court, as an expert witness on the interpretation and application of the DPA. *Id.*, at 719–721, 726–727, 734.

Jenkins testified that the vice consuls made the final decision about an applicant's eligibility for displaced person status.[13] He indicated that if there had been any suggestion that an applicant "had served or been involved in" a concentration camp, processing of his application would have been suspended to permit a thorough investigation. *Id.*, at 766. If it were then determined that the applicant had been an armed guard at the camp, he would have been found ineligible for a visa as a matter of law. *Id.*, at 767–768, 822. Jenkins explained that service as an armed guard at a concentration camp brought the applicant under the statutory exclusion of persons who "assisted the enemy in persecuting civil[ians]," regardless of whether the applicant had not volunteered for service[14] or had not committed atrocities against inmates. *Id.*, at 768, 797–798. Jenkins emphasized that this interpretation of the Act was "uniformly" accepted by the vice consuls, and that furthermore, he knew of no case in which a known concentration camp guard was found eligible for a DPA visa.[15] *Id.*, at 767. Jenkins also described the elabo-

[13] The vice consul's decision could be overridden by the consul general, but Jenkins testified that he knew of no situation in which this happened. *Id.*, at 721–722.

[14] On the basis of the vice consuls' experiences, Jenkins discounted the possibility that any concentration camp guards had served involuntarily. *Id.*, at 756, 772, 795–796. Jenkins reported that all the guards who were questioned by the consular officials about their reasons for serving as guards invariably admitted that their service was voluntary. *Id.*, at 807–808. In addition, Jenkins testified that even if an applicant refused to acknowledge that his service as an armed guard was voluntary, he would still have been denied a visa. *Id.*, at 822–826.

[15] Jenkins testified that at times concentration camp survivors who recognized a visa applicant as a guard would notify consular officials who

rate system that was used to screen visa applicants and he testified that in interviewing applicants, the vice consuls bent over backwards in interrogating each person to make sure the applicant understood what he was doing. *Id.*, at 746.

Petitioner took the stand in his own behalf. He admitted his service as an armed guard at Treblinka and that he had known that thousands of Jewish inmates were being murdered there. *Id.*, at 1442, 1451–1452, 1465. Petitioner claimed that he was forced to serve as a guard and denied any personal involvement in the atrocities committed at the camp, *id.*, at 1276, 1297–1298, 1539–1540; he insisted that he had merely been a perimeter guard. Petitioner admitted, however, that he had followed orders and shot in the general direction of escaping inmates during the August 1943 uprising that led to closure of the camp. *Id.*, at 1507–1509, 1546, 1564. Petitioner maintained that he was a prisoner of war at Treblinka, *id.*, at 1495, although he admitted that the Russian armed guards significantly outnumbered the German soldiers at the camp,[16] that he was paid a stipend and received a good service stripe from the Germans, and that he was allowed to leave the camp regularly but never tried to escape. *Id.*, at 1467–1471, 1489–1494, 1497, 1508.[17] Finally, petitioner conceded that he deliberately gave false statements about his wartime activities to the investigators from the Displaced Persons Commission and to the vice consul who reviewed his visa application. *Id.*, at 1518–1524.

The District Court entered judgment in favor of petitioner.

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in turn investigated the matter. If the accusation proved true, the applicant was confronted with it and invariably found ineligible for a visa. *Id.*, at 804, 807, 826–827.

[16] Petitioner testified that there were between 120 and 150 armed Russian guards and some 20 to 30 Germans. *Id.*, at 1444–1445.

[17] Petitioner testified that between 15 and 20 Russian guards escaped from the camp. Four were caught and apparently executed, but petitioner testified that he did not know what happened to the others. *Id.*, at 1535–1536, 1555.

455 F. Supp. 893 (1978). The court found that petitioner had served as an armed guard at Treblinka and that he lied about his wartime activities when he applied for a DPA visa in 1949.[18] The court found, however, that petitioner was forced to serve as a guard. The court concluded that it could credit neither the Treblinka survivors' identification of petitioner nor their testimony,[19] and it held that the Government had not met its burden of proving that petitioner committed war crimes or atrocities at Treblinka.

Turning to the question whether petitioner's false statements about his activities during the war were misrepresentations of "material" facts, the District Court, relying on our decision in *Chaunt* v. *United States*, 364 U. S. 350 (1960), held that the Government had to prove

> "that either (1) facts were suppressed 'which, if known, would have warranted denial of citizenship' or (2) that their disclosure 'might have been useful in an investiga-

[18] The court also noted that there was no dispute about the fact that petitioner lied when he listed his birthplace as Sarny, Poland. 455 F. Supp., at 914.

[19] The court rejected the witnesses' pretrial identifications because it found the photo spreads from which the identifications were made impermissibly suggestive. The court also rejected the in-court identifications by three of the witnesses. The court noted that the first witness initially picked out a spectator in the courtroom and only identified petitioner when it became obvious from the crowd reaction that he had made a mistake. The other two witnesses identified petitioner who was seated at counsel table surrounded by much younger men. The court concluded that the courtroom identifications were tainted by the photo identification and by discussion of the case among the witnesses.

The court also found credibility problems with the testimony of the Treblinka survivors, and it concluded that "[e]ven without defendant's testimony, the Government's evidence on the claimed commission of atrocities . . . fell short of meeting the 'clear, convincing and unequivocal' burden of proof. . . . With defendant's testimony the Government's evidence . . . left the court with suspicions about whether defendant participated in atrocities at Treblinka but they were only suspicions." *Id.*, at 909.

tion possibly leading to the discovery of other facts warranting denial of citizenship.'" 455 F. Supp., at 915 (quoting 364 U. S., at 355).

The District Court rejected the Government's claim that disclosure of petitioner's service as a concentration camp armed guard would have been grounds for denial of citizenship. The court therefore ruled that the withheld facts were not material under the first *Chaunt* test. The Government argued, however, that the second *Chaunt* test did not require proof that the concealed facts prevented an investigation that *would* have revealed facts warranting denial of citizenship. The Government contended instead that the second test merely required proof that an investigation *might* have uncovered such facts and it argued that petitioner's concealment of his service at Treblinka fell within this test. The District Court conceded that the language of *Chaunt* was ambiguous enough to support the Government's interpretation of the second test. But relying on decisions by the United States Courts of Appeals for the Third and Ninth Circuits,[20] the District Court rejected the Government's position and interpreted both *Chaunt* tests as requiring proof that "the true facts would have warranted denial of citizenship." 455 F. Supp., at 916. Applying this test, the court ruled that petitioner's false statements were not "material" within the meaning of the denaturalization statute. In doing so, the court first rejected Jenkins' testimony and held that petitioner was not ineligible for a DPA visa. The court concluded that petitioner did not come under the DPA's exclusion of persons who had assisted in the persecution of civilians because he had served involuntarily. Second, the court found that although disclosure of petitioner's service as a Treblinka guard "certainly would" have prompted an investigation into

[20] *United States* v. *Riela*, 337 F. 2d 986 (CA3 1964); *United States* v. *Rossi*, 299 F. 2d 650 (CA9 1962); *La Madrid-Peraza* v. *Immigration and Naturalization Service*, 492 F. 2d 1297 (CA9 1974).

his activities, the Government had failed to prove that such an inquiry would have uncovered any additional facts warranting denial of petitioner's application for a visa. *Id.*, at 916.[21]

As an alternative basis for its decision, the District Court held that even assuming that petitioner had misrepresented "material" facts, equitable and mitigating circumstances required that petitioner be permitted to retain his citizenship. Specifically, the court relied on its finding that the evidence that petitioner had committed any war crimes or atrocities at Treblinka was inconclusive, as well as the uncontroverted evidence that he had been responsible and law-abiding since coming to the United States. The District Court suggested that this Court had not previously considered the question whether a district court has discretion to consider the equities in a denaturalization case. The court reasoned that since *naturalization* courts have considered the equities in determining whether citizenship should be granted, similar discretion should also be available in *denaturalization* proceedings.

The Court of Appeals for the Fifth Circuit reversed and remanded the case with instructions to enter judgment for the Government and to cancel petitioner's certificate of citizenship. 597 F. 2d 946 (1979). Although the Court of Appeals agreed with the District Court that *Chaunt* was controlling on the question of the materiality of petitioner's false statements, it disagreed with the District Court's interpreta-

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[21] The court also found that petitioner's false statements about his birthplace and nationality were not "material" misrepresentations. The court explained that the true facts would not of themselves have justified denial of citizenship since Ukrainians *per se* were not excluded under the DPA. The court also noted that petitioner disclosed the truth about his place of birth and nationality when he filed Declarations of Intention in 1950 and 1951, and that the INS examiner who interviewed petitioner in connection with his application for citizenship testified that his previous false statements about these questions were not a cause for concern. 455 F. Supp., at 915.

tion of the second *Chaunt* test as requiring proof of ultimate facts warranting denial of citizenship. Instead, the Court of Appeals agreed with the Government that the second *Chaunt* test requires only clear and convincing proof that (a) disclosure of the true facts *would* have led to an investigation and (b) the investigation *might* have uncovered other facts warranting denial of citizenship.[22]

In applying its formulation of the second *Chaunt* test to the facts of the case, the Court of Appeals concluded that one part of the test was satisfied by the District Court's finding that the American authorities *would* have conducted an investigation if petitioner had disclosed that he had served as an armed guard at Treblinka. The Court of Appeals then found that Jenkins' testimony and other evidence before the District Court clearly and convincingly proved that the investigation *might* have resulted in denial of petitioner's application for a visa[23] and the Court of Appeals held that petitioner procured his naturalization "by misrepresentation and concealment of his whereabouts during the war years and his service as a concentration camp guard." 597 F. 2d, at 953. The Court of Appeals further held that the District Court had erred in supposing that it had discretion to enter judgment in favor of petitioner notwithstanding a finding that

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[22] The Court of Appeals explained that the District Court's interpretation "destroyed the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the government prove ultimate facts warranting denial of citizenship." 597 F. 2d, at 951. The court also pointed out that adopting the District Court's view would provide a strong incentive to an applicant for a visa or citizenship to lie about his background and thereby prevent an inquiry into his fitness at a time when he has the burden of proving eligibility. If his deception were later uncovered, the Government would face the difficult tasks of conducting an inquiry into his past, discovering facts warranting disqualification, and proving those facts by clear and convincing evidence. *Ibid.*

[23] The Court of Appeals noted that its formulation of the second *Chaunt* test was adopted by the Second Circuit in *United States* v. *Oddo*, 314 F. 2d 115, cert. denied, 375 U. S. 833 (1963).

petitioner had procured his naturalization by willfully concealing material facts. The Court of Appeals concluded that "[t]he denaturalization statute . . . does not accord the district courts any authority to excuse the fraudulent procurement of citizenship." *Id.*, at 954. Accordingly, the Court of Appeals held that petitioner's citizenship must be revoked.[24] We affirm, but for reasons which differ from those stated by the Court of Appeals.

II

Our examination of the questions presented by this case must proceed within the framework established by two lines of prior decisions of this Court that may, at first blush, appear to point in different directions.

On the one hand, our decisions have recognized that the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences. See *Costello* v. *United States*, 365 U. S. 265, 269 (1961); *Chaunt* v. *United States*, 364 U. S., at 353; *Baumgartner* v. *United States*, 322 U. S. 665, 675–676 (1944); *Schneiderman* v. *United States*, 320 U. S. 118, 122 (1943). For these reasons, we have held that the Government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." *Costello* v. *United States*, *supra*, at 269. The evidence justifying revocation of citizenship must be " 'clear, unequivocal, and convincing' " and not leave " 'the issue in doubt.' " *Schneiderman* v. *United States*, *supra*, at 125 (quoting *Maxwell Land-Grant Case*, 121 U. S. 325, 381 (1887)). Any less exacting standard would be inconsistent with the importance of the right that

[24] Because it ruled in favor of the Government under the second *Chaunt* test, the Court of Appeals had no reason to consider the Government's claim that, contrary to the District Court's findings, the evidence at trial clearly and convincingly proved that petitioner committed crimes and atrocities against inmates while he was an armed guard at Treblinka. We accept, for purposes of this case, the District Court's findings on this issue.

is at stake in a denaturalization proceeding. And in reviewing denaturalization cases, we have carefully examined the record ourselves. See, *e. g.*, *Costello* v. *United States, supra; Chaunt* v. *United States, supra; Nowak* v. *United States,* 356 U. S. 660 (1958); *Baumgartner* v. *United States, supra.*

At the same time, our cases have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. 8 U. S. C. § 1451 (a); *Afroyim* v. *Rusk,* 387 U. S. 253, 267, n. 23 (1967). See *Maney* v. *United States,* 278 U. S. 17 (1928); *United States* v. *Ness,* 245 U. S. 319 (1917); *United States* v. *Ginsberg,* 243 U. S. 472 (1917). As we explained in one of these prior decisions:

> "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. . . .
>
> . . . . . .
>
> "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with such requirements." *United States* v. *Ginsberg, supra,* at 474–475.

This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization,[25] and the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizen-

[25] The Constitution empowers Congress to "establish an uniform Rule of Naturalization." Art. I, § 8, cl. 4.

ship by naturalization legislated to safeguard the integrity of this "priceless treasure." *Johnson* v. *Eisentrager*, 339 U. S. 763, 791 (1950) (Black, J., dissenting).

Thus, what may at first glance appear to be two inconsistent lines of cases actually reflect our consistent recognition of the importance of the issues that are at stake—for the citizen as well as the Government—in a denaturalization proceeding. With this in mind, we turn to petitioner's contention that the Court of Appeals erred in reversing the judgment of the District Court.

III

Petitioner does not and, indeed, cannot challenge the Government's contention that he willfully misrepresented facts about his wartime activities when he applied for a DPA visa in 1949. Petitioner admitted at trial that he "willingly" gave false information in connection with his application for a DPA visa so as to avoid the possibility of repatriation to the Soviet Union.[26] Record 1520. The District Court specifically noted that there was no dispute that petitioner "lied" in his application. 455 F. Supp., at 914. Thus, petitioner falls within the plain language of the DPA's admonition that "[a]ny person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013. This does not, however, end our inquiry, because we agree with the Government [27] that this provision only applies to willful misrepresentations about "material" facts.[28] The first issue we must

[26] That petitioner gave these false statements because he was motivated by fear of repatriation to the Soviet Union indicates that he understood that disclosing the truth would have affected his chances of being admitted to the United States and confirms that his misrepresentation was willful.

[27] See Brief for United States 18, n. 13.

[28] Although the denaturalization statute speaks in terms of "willful misrepresentation" or "concealment of a material fact," this Court has indi-

examine then, is whether petitioner's false statements about his activities during the war, particularly the concealment of his Treblinka service, were "material."

A

At the outset, we must determine the proper standard to be applied in judging whether petitioner's false statements were material. Both petitioner and the Government have assumed, as did the District Court and the Court of Appeals, that materiality under the above-quoted provision of the DPA is governed by the standard announced in *Chaunt* v. *United States*, 364 U. S. 350 (1960). But we do not find it so obvious that the *Chaunt* test is applicable here. In that case, the Government charged that Chaunt had procured his citizenship by concealing and misrepresenting his record of arrests in the United States in his application for citizenship, and that the arrest record was a "material" fact within the meaning of the denaturalization statute.[29] Thus, the materiality standard announced in that case pertained to false statements in applications for *citizenship*, and the arrests that Chaunt failed to disclose all took place after he came to this country. The case presented no question concerning the lawfulness of his initial entry into the United States.

In the instant case, however, the events on which the Government relies in seeking to revoke petitioner's citizenship took place before he came to this country and the Govern-

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cated that the concealment, no less than the misrepresentation, must be willful and that the misrepresentation must also relate to a material fact. See *Costello* v. *United States*, 365 U. S. 265, 271–272, n. 3 (1961). Logically, the same principle should govern the interpretation of this provision of the DPA.

[29] One question on the form Chaunt submitted in connection with his petition for citizenship, asked if he had ever "been arrested or charged with violation of any law of the United States or State or city ordinance or traffic regulation" and if so give full particulars. To this question Chaunt answered "no."

ment is seeking to revoke petitioner's citizenship because of the alleged unlawfulness of his initial entry into the United States. Although the complaint charged that petitioner misrepresented facts about his wartime activities in both his application for a visa and his application for naturalization, both the District Court and the Court of Appeals focused on the false statements in petitioner's application for a visa. Thus, under the analysis of both the District Court and the Court of Appeals, the misrepresentation that raises the materality issue in this case was contained in petitioner's application for a visa.[30] These distinctions plainly raise the important question whether the *Chaunt* test for materiality of misrepresentations in applications for *citizenship* also applies to false statements in *visa* applications.

It is, of course, clear that the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country. See *United States* v. *Rossi*, 299 F. 2d 650, 652 (CA9 1962). At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa. Because we conclude that disclosure of the true facts about petitioner's service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the DPA, we find it unnecessary to resolve the question whether *Chaunt*'s materiality test also governs false statements in visa applications.

Section 2 (b) of the DPA, 62 Stat. 1009, by incorporating the definition of "[p]ersons who will not be [considered dis-

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[30] Neither the District Court nor the Court of Appeals directly focused on the distinction between false statements in a visa application and false statements in an application for citizenship. The District Court's opinion suggests that it concluded that there were no willful misrepresentations in petitioner's 1970 application for citizenship. See 455 F. Supp., at 916–917. The Court of Appeals characterized the case as involving "a misrepresentation by nondisclosure." 597 F. 2d, at 947.

placed persons]" contained in the Constitution of the IRO, see n. 3, *supra*, specifically provided that individuals who "assisted the enemy in persecuting civil[ians]" were ineligible for visas under the Act.[31] Jenkins testified that petitioner's service as an armed guard at a concentration camp—whether voluntary or not—made him ineligible for a visa under this provision.[32] Jenkins' testimony was based on his firsthand

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[31] Hereafter, references to §§ 2 (a) and 2 (b), rather than referring to §§ 2 (a) and 2 (b) of the DPA, follow the designation of the definitional provisions in the IRO Constitution, see 62 Stat. 3051–3052, incorporated in § 2 (b) of the DPA.

[32] Jenkins testified as follows:

"Q If through investigation or interview you had determined that [a visa] applicant in fact did serve at a death camp . . . in occupied Poland as a Ukrainian Guard would you have denied the visa application?

"A Yes, I would.

"Q And in your expert opinion would such a person have qualified as an eligible displaced person?

"A No, he would not have.

"Q I may have asked this question, if I have permit me to ask it again, . . . are you aware of any case whatsoever in which an axis auxiliary who served in a capacity as a camp guard was ever legally qualified as a displaced person?

"A No, I am not. I am reasonably certain that there was no such case.

. . . . . .

"Q Mr. Jenkins, referring to the last question and answer, would it have made any difference whatsoever to you as a visa officer if the person could have been proven to have been a guard but you could not prove that he committed an atrocity?

"A No.

"THE COURT: Why? Why?

"THE WITNESS: Because under the Displaced Persons Act and in the International Refugee Organization constitution by . . . definition such a person could not be a displaced person." Record 767–768.

On cross-examination, Jenkins was asked:

"Q Despite the apparent assumption that a guard at a concentration camp was there voluntarily, a non-German was there voluntarily, if a non-German guard came to you and said to you that his service there was

experience as a vice consul in Germany after the war reviewing DPA visa applications. Jenkins also testified that the practice of the vice consuls was to circulate among the other vice consuls the case files of any visa applicant who was shown to have been a concentration camp armed guard. Record 826. Thus, Jenkins and the other vice consuls were particularly well informed about the practice concerning the eligibility of former camp guards for DPA visas. The District Court evidently agreed that a literal interpretation of the statute would confirm the accuracy of Jenkins' testimony. 455 F. Supp., at 913. But by construing § 2 (a) as only excluding individuals who *voluntarily* assisted in the persecution of civilians, the District Court was able to ignore Jenkins' uncontroverted testimony about how the Act was interpreted by the officials who administered it.[33]

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involuntary would that guard have been eligible under the Displaced Persons Act and would he have been granted a visa?

"A I don't believe so. In the first place I can't imagine this hypothetical situation. And secondly, I think the language of the Act is so clear that participation or even acquiesce[nce] in really doesn't leave the vice consul that kind of latitude.

. . . . . .

"THE COURT: . . . What is there about it that would make you think it was so clear that you had no latitude, if he had according to the hypothetical, persuaded you that his service as a guard was involuntary? How would that differ from involuntary service in the Waffen SS [Axis combat unit]?

"A Because the crime against humanity that is involved in the concentration camp puts it into a different category . . . ." *Id.*, at 822–823.

[33] The District Court felt compelled to impose a voluntariness requirement because it was concerned that a literal interpretation of § 2 (a) would "bar every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp." 455 F. Supp., at 913. The court noted that working prisoners led arriving prisoners to the lazaret where they were murdered, cut the hair of the women who were to be executed, or played in the orchestra at the gate to the camp as part of the Germans' ruse to persuade new arrivals that the camp was other than what it was. The court pointed out that such actions could tech-

The Court of Appeals evidently accepted the District Court's construction of the Act since it agreed that the Government had failed to show that petitioner was ineligible for a DPA visa. 597 F. 2d, at 953. Because we are unable to find any basis for an "involuntary assistance" exception in the language of § 2 (a), we conclude that the District Court's construction of the Act was incorrect. The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa. That Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing § 2 (a) with § 2 (b), which excludes only those individuals who "*voluntarily* assisted the enemy forces . . . in their operations . . . ." Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from § 2 (a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.[34] See *National Railroad Passenger Corp.*

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nically be deemed assistance, and concluded that it would be "absurd to deem their conduct 'assistance or acquiescence' inasmuch as it was involuntary—even though the word 'voluntarily' was omitted from the definition." *Ibid.* In addition, the court noted that Jenkins testified that visa applicants who had served in Axis combat units and who could prove that their service was involuntary were found eligible for visas. *Id.*, at 912. But see n. 34, *infra.*

[34] The solution to the problem perceived by the District Court, see n. 33, *supra*, lies, not in "interpreting" the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits

v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458 (1974); *Botany Worsted Mills* v. *United States*, 278 U. S. 282, 289 (1929). As this Court has previously stated: "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it." *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21, 38 (1934). See *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 514–515 (1963). Thus, the plain language of the statute and Jenkins' uncontradicted and unequivocal testimony leave no room for doubt that if petitioner had disclosed the fact that he had been an armed guard at Treblinka, he would have been found ineligible for a visa under the DPA.[35] This being so, we must conclude that peti-

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within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case. As for the District Court's concern about the different treatment given to visa applicants who had served in Axis combat units who were found eligible for visas if they could show that they had served involuntarily, this distinction was made by the Act itself.

[35] The District Court refused to give conclusive weight to Jenkins' testimony on this issue largely because it felt that Jenkins' testimony did not recognize the "voluntariness" exception that the court read into § 2 (a). However, Jenkins' testimony was in accordance with the plain language of the statute. Because the District Court mistakenly applied the law to the facts of this case in concluding that petitioner was lawfully admitted into this country, 455 F. Supp., at 915, we reject its conclusion.

The dissenting opinion of JUSTICE STEVENS argues that the Government "expressly disavowed" our interpretation of the DPA, *post*, at 530, and that the Government "unequivocally accepted" the District Court's construction of § 2 (a), *post*, at 535. Elsewhere, the dissent suggests that the District Court's construction is "the Government's interpretation of the statute," *post*, at 536. The sole basis for these assertions is a footnote in the Government's brief in the Court of Appeals which merely stated: "The United States *has no quarrel with* [the District Court's] construction [of § 2 (a)] *in this case*" (emphasis added). In our judgment, none of the dissent's claims is borne out by this statement. The suggestion that the Government "unequivocally accepted" the District Court's interpretation of the Act is at best an exaggeration, and we have found no evidence in the record or briefs in this case of the Government's

tioner's false statements about his wartime activities were "willfu[l] [and material] misrepresentation[s] [made] for the purpose of gaining admission into the United States as an eligible displaced person." 62 Stat. 1013. Under the express terms of the statute, petitioner was "thereafter not . . . admissible into the United States." *Ibid.*

Our conclusion that petitioner was, as a matter of law, ineligible for a visa under the DPA makes the resolution of this case fairly straightforward. As noted, *supra*, at 506–507, our cases have established that a naturalized citizen's failure to comply with the statutory prerequisites for naturalization renders his certificate of citizenship revocable as "illegally procured" under 8 U. S. C. § 1451 (a). In 1970, when petitioner filed his application for and was admitted to citizenship, §§ 316 (a) and 318 of the Immigration and Nationality Act of 1952, 8 U. S. C. §§ 1427 (a) and 1429, required an applicant for citizenship to be lawfully admitted to the United States for permanent residence.[36] Lawful admission for per-

"express disavowal" of our construction of § 2 (a). Furthermore, being neither endowed with psychic powers nor privy to the Government's deliberations, we cannot join JUSTICE STEVENS, see *post*, at 535–536, in speculating about the reasons that the Government chose not to "quarrel with" the District Court's interpretation of § 2 (a) "in this case."

As for JUSTICE STEVENS' belief that our interpretation of the statute is "erroneous," see *post*, at 533, we simply note that he is unable to point to anything in the language of the Act that justifies reading into § 2 (a) the "voluntariness" limitation that Congress omitted. Thus, we must conclude that JUSTICE STEVENS' real quarrel is with Congress, which drafted the statute. It is not the function of the courts to amend statutes under the guise of "statutory interpretation." See *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, *ante*, at 274. Finally, since the term "persecution" does not apply to some of the tasks performed by concentration camp inmates, see n. 34, *supra*, we reject the speculation that our decision "may jeopardize the citizenship of countless survivors of Nazi concentration camps," *post*, at 530 (STEVENS, J., dissenting).

[36] Title 8 U. S. C. § 1429 provides in pertinent part: "[N]o person shall be naturalized unless he has been lawfully admitted to the United States

manent residence in turn required that the individual possess a valid unexpired immigrant visa. At the time of petitioner's initial entry into this country, § 13 (a) of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 153, 161 (repealed in 1952), provided that "[n]o immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa . . . ."[37] The courts at that time consistently held that § 13 (a) required a valid visa and that a visa obtained through a material misrepresentation was not valid. See, *e. g.*, *Ablett* v. *Brownell*, 99 U. S. App. D. C. 387, 391, 240 F. 2d 625, 629 (1957); *United States ex rel. Jankowski* v. *Shaughnessy*, 186 F. 2d 580, 582 (CA2 1951). Section 10 of the DPA, 62 Stat. 1013, provided that "all immigration laws, . . . shall be applicable to . . . eligible displaced . . . persons who apply to be or who are admitted into the United States pursuant to this Act." And as previously noted, petitioner was inadmissible into this country under the express terms of the DPA. Accordingly, inasmuch as petitioner failed to satisfy a statutory requirement which Congress has imposed as a prerequisite to the acquisition of citizenship by naturalization, we must agree with the Government that petitioner's citizenship must be revoked because it was "illegally procured." See *Polites* v. *United States*, 364 U. S. 426, 436–437 (1960); *Schwinn* v. *United States*, 311 U. S. 616 (1940); *Maney* v. *United States*, 278 U. S., at 22–23; *United States* v. *Ginsberg*, 243 U. S., at 475; *Luria* v. *United States*, 231 U. S. 9, 17 (1913); *Johannessen* v. *United States*, 225 U. S. 227, 240 (1912). Cf. *Schneiderman* v. *United States*, 320 U. S., at 163 (Douglas, J., concurring).[38] In the lexicon

for permanent residence in accordance with all applicable provisions of this chapter." See also 8 U. S. C. § 1427 (a).

[37] The same requirement is now contained in 8 U. S. C. § 1181 (a) which provides that "no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa . . . ."

[38] See H. R. Rep. No. 1086, 87th Cong., 1st Sess., 39 (1961) (Citizenship

of our cases, one of the "jurisdictional facts upon which the grant [of citizenship] is predicated," *Johannessen* v. *United States, supra,* at 240, was missing at the time petitioner became a citizen.

B

This conclusion would lead us to affirm on statutory grounds (and not on the basis of our decision in *Chaunt*), the judgment of the Court of Appeals. Petitioner argues, however, that in a denaturalization proceeding, a district court has discretion to consider the equities in determining whether citizenship should be revoked. This is the view adopted by the District Court but rejected by the Court of Appeals. It is true, as petitioner notes, that this Court has held that a denaturalization action is a suit in equity. *Knauer* v. *United States,* 328 U. S. 654, 671 (1946); *Luria* v. *United States, supra,* at 27–28. Petitioner further points to numerous cases in which the courts have exercised discretion in determining whether citizenship should be granted. See, *e. g., In re Iwanenko's Petition,* 145 F. Supp. 838 (ND Ill. 1956); *Petition of R.,* 56 F. Supp. 969 (Mass. 1944). Petitioner would therefore have us conclude that similar discretion should be available to a denaturalization court to weigh the equities in light of all the circumstances in order to arrive at a solution that is just and fair. He then argues that if such power exists, the facts of this case, particularly his record of good conduct over the past 29 years and the reasonable doubts about some of the allegations in the Government's complaint, all weigh in favor of permitting him to retain his citizenship. Although petitioner presents this argument with respect to revocation of citizenship procured through willful misrepresentation of material facts, we assume that petitioner believes that courts should also be allowed to weigh the equities in

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is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization is] granted").

deciding whether to revoke citizenship that was "illegally procured," which is our holding in this case.

We agree with the Court of Appeals that district courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts. Petitioner is correct in noting that courts necessarily and properly exercise discretion in characterizing certain facts while determining whether an applicant for citizenship meets some of the requirements for naturalization.[39] But that limited discretion does not include the authority to excuse illegal or fraudulent procurement of citizenship. As the Court of Appeals stated: "Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship." 597 F. 2d, at 954. By the same token, once a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct. Indeed, contrary to the District Court's suggestion, see *supra*, at 503, this issue had been settled by prior decisions of this Court. In case after case, we have rejected lower court efforts to moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings. For example, in *United States* v. *Ness*, 245 U. S. 319 (1917), we ordered the denaturalization of an individual who "possessed the personal qualifications which entitle aliens to admission and to citizenship," *id.*, at 321, but who had failed to file a certificate of arrival as required by statute. We explained that there was "no power . . . vested in the naturalization court to dispense with" this requirement.

[39] Courts must consider the facts and circumstances in deciding whether an applicant satisfies such requirements for naturalization as good moral character and an understanding of the English language, American history, and civics. See 8 U. S. C. §§ 1423, 1427 (d).

Id., at 324. We repeat here what we said in one of these earlier cases:

> "An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. *United States* v. *Ginsberg*, 243 U. S., at 474–475.

See *Maney* v. *United States*, 278 U. S., at 22–23; *Johannessen* v. *United States*, 225 U. S., at 241–242.

In sum, we hold that petitioner's citizenship must be revoked under 8 U. S. C. § 1451 (a) because it was illegally procured. Accordingly, the judgment of the Court of Appeals is affirmed.[40]

So ordered.

THE CHIEF JUSTICE concurs in the judgment.

JUSTICE BLACKMUN, concurring in the judgment.

I agree with much of the Court's reasoning as well as with the result it reaches. I am perplexed, however, by the Court's reluctance, *ante*, at 508–509, to apply the materiality standard of *Chaunt* v. *United States*, 364 U. S. 350 (1960), to petitioner's circumstances. I write separately to express my understanding that application of *Chaunt* would yield no different result here and to state my belief that a standard as rigorous as *Chaunt*'s is necessary to protect the rights of our naturalized citizens.

In *Chaunt*, the issue presented was whether failure to reveal certain prior arrests in response to a question on a citizenship application form constituted misrepresentation or concealment

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[40] Our decision makes it unnecessary to resolve the question whether the Court of Appeals correctly interpreted the materiality test enunciated in *Chaunt*.

of a material fact for purposes of the denaturalization statute.[1] *Id.*, at 351–352. As construed by *Chaunt*, the statute authorizes denaturalization on the basis of an applicant's failure to disclose suppressed facts which (1) "if known, would have warranted denial of citizenship," or (2) "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.*, at 355.

The Court says that *Chaunt* need not be invoked when denaturalization is premised on deliberate misstatements at the *visa* application stage, but does not explain why this is so. I fail to see any relevant limitation in the *Chaunt* decision or the governing statute that bars *Chaunt*'s application to this case. By its terms, the denaturalization statute at the time of *Chaunt*, as now, was not restricted to any single stage of the citizenship process.[2] Although in *Chaunt* the nondisclosures arose in response to a question on a citizenship application form filed some years after the applicant first arrived in this country, nothing in the language or import of the opinion suggests that omissions or false statements should be assessed differently when they are tendered upon initial entry into this country. If such a distinction was intended, it has eluded the several courts that unquestioningly have applied *Chaunt*'s materiality standard when reviewing alleged distortions in the visa request process. See, *e. g.*, *Kassab* v. *Immigration &*

[1] The statute is § 340 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 8 U. S. C. § 1451 (a). Its relevant provisions are quoted *ante*, at 493, n. 1.

[2] Except for the prohibition against "illegally procured" citizenship, added in 1961 by Pub. L. 87–301, § 18 (a), 75 Stat. 656, the statute today is unchanged from the version considered in *Chaunt*. Now, as then, it authorizes the initiation of denaturalization proceedings should the Government discover that the order admitting a person to citizenship was "procured by concealment of a material fact or by willful misrepresentation." In accord with the Court's prior construction of this phrase, both the concealment and the misrepresentation must be willful, and each must also relate to a material fact. *Ante*, at 507–508, n. 28, citing *Costello* v. *United States*, 365 U. S. 265, 271–272, n. 3 (1961).

Naturalization Service, 364 F. 2d 806 (CA6 1966); *United States* v. *Rossi*, 299 F. 2d 650 (CA9 1962); *Langhammer* v. *Hamilton*, 295 F. 2d 642 (CA1 1961).

I doubt that the failure of these courts to raise any question about the relevance of *Chaunt* was an oversight. It is far from clear to me that the materiality of facts should vary because of the time at which they are concealed or misrepresented. Nor do I see why the events or activities underlying these facts become more or less material depending upon the country in which they transpired.[3] In each context, the inquiry concerning nondisclosure addresses the same fundamental issue: did the applicant shield from review facts material to his eligibility for citizenship?

In *Chaunt*, the Court articulated two approaches to provide guidance and uniformity in such inquiries. The Court today adopts what it considers a new and minimal definition of materiality: it announces that a misrepresentation is material "if disclosure of the true facts would have made the applicant ineligible for a visa." *Ante*, at 509. This standard bears no small resemblance to the "first test" of *Chaunt*, for it too deems material those facts "which, if known, would have warranted denial of" eligibility. 364 U. S., at 355. Because I see no effective difference between the standards, nor any persuasive grounds for contriving a difference, I would rely explicitly upon the *Chaunt* test here and avoid risking

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[3] This discussion of materiality relates only to proceedings brought by the Government to *de*naturalize a United States citizen. I do not mean to suggest that, for purposes of *attaining* citizenship, a misrepresentation must be analyzed in an identical fashion. The immigration law historically has afforded greater protections to persons already admitted to citizenship than to those seeking to obtain its privileges and benefits. This choice, however, reflects a judgment that the weighty interest in citizenship should be neither casually conferred nor lightly revoked. See *Berenyi* v. *District Director*, 385 U. S. 630, 636–637 (1967). In view of petitioner's status as a United States citizen, it is unnecessary to consider here the question of materiality at the naturalization stage.

the confusion that is likely to be engendered by multiple standards.[4]

Application of *Chaunt* to the instant record would not result in any significant departure from the Court's basic analysis. As the Court notes, *ante*, at 500, petitioner admitted at trial that he deliberately misrepresented his wartime activities and whereabouts when communicating with representatives of the Displaced Persons Commission during the visa application process. Record 1518–1522.[5] The expert testimony of former Vice Consul Jenkins demonstrates convincingly that an applicant who had served as a concentration camp guard would not have qualified for a displaced person's visa.[6] The determination to exclude persons who had assisted in persecuting civilians was grounded in a clear statutory mandate,[7] and uncontroverted testimony established that

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[4] Confusion to some extent is already present. We granted certiorari in this case primarily to resolve conflicting interpretations of the *Chaunt* materiality standard. Compare *United States* v. *Riela*, 337 F. 2d 986 (CA3 1964), and *United States* v. *Rossi*, 299 F. 2d 650 (CA9 1962), with *Kassab* v. *Immigration & Naturalization Service*, 364 F. 2d 806 (CA6 1966), and *Langhammer* v. *Hamilton*, 295 F. 2d 642 (CA1 1961).

[5] JUSTICE WHITE's observation in dissent, *post*, at 529, and n. 10, is not to the contrary. The District Court found a lack of willfulness with respect to the nondisclosure on petitioner's citizenship application form, completed in 1969. As the Court correctly observes, *ante*, at 507, n. 26, petitioner's misrepresentations at the visa application stage were plainly willful.

[6] Record 766–768, 822–823, substantially reproduced, *ante*, at 510–511, n. 31. Jenkins further testified at length that, based on his knowledge and experience, "involuntary" guard service in Nazi concentration camps was unknown and virtually inconceivable. Record 754–758, 807–808, 823–824. While I find much of this testimony persuasive, I do not need to rely upon it here since petitioner's ineligibility for a visa is independently established. See nn. 7 and 8, *infra*.

[7] The Displaced Persons Act, 62 Stat. 1009, enabled refugees driven from their homelands during and after World War II to emigrate to the United States without regard to traditional immigration quotas. Eligibility was extended consistent with requirements set forth in Annex I to

the statute was consistently applied in just this fashion against individuals in petitioner's position.[8] Under these circumstances, I agree with the Court that petitioner's true activities, if known, would certainly have warranted denial of his visa application. Without a valid visa, petitioner could not have been considered for status as a United States citizen. Having proved this much by clear and convincing evidence, the Government has satisfied the first test of *Chaunt*.

This test strikes a careful and necessary balance between the Government's commitment to supervising the citizenship process and the naturalized citizen's interest in preserving his status. The individual seeks to retain his citizenship right to full and equal status in our national community, a right conferring benefits of inestimable value upon those who possess it. The freedoms and opportunities secured by United States citizenship long have been treasured by persons fortunate enough to be born with them, and are yearned for by countless less fortunate. Indeed, citizenship has been described as "man's basic right for it is nothing less than the right to have rights."[9] and the effects of its loss justly have been called "more serious than a taking of one's property, or

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the Constitution of the International Refugee Organization of the United Nations. This excluded the following displaced persons from its ambit of concern:

"1. War criminals, quislings and traitors.

"2. Any other persons who can be shown:

"(*a*) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

"(*b*) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." Annex I, Part II, 62 Stat. 3051–3052.

[8] Record 766–768. See also *id.*, at 790 (concentration camp guards themselves understood that admission of their former status, without more, was enough to render them ineligible).

[9] *Perez* v. *Brownell*, 356 U. S. 44, 64 (1958) (Warren, C. J., dissenting).

the imposition of a fine or other penalty." [10] Where, as here, the Government seeks to revoke this right, the Court consistently and forcefully has held that it may do so only on scrupulously clear justification and proof. *Costello* v. *United States*, 365 U. S. 265 (1961); *Nowak* v. *United States*, 356 U. S. 660 (1958); *Knauer* v. *United States*, 328 U. S. 654 (1946); *Baumgartner* v. *United States*, 322 U. S. 665 (1944); *Schneiderman* v. *United States*, 320 U. S. 118 (1943). Before sustaining any decision to impose the grave consequences of denaturalization, the Court has regarded it as its duty "to scrutinize the record with the utmost care," [11] construing "the facts and the law . . . as far as is reasonably possible in favor of the citizen." [12]

The *Chaunt* decision is properly attentive to this long-recognized unique interest in citizenship, and I must join the Court in not accepting the reasoning of the Court of Appeals, which would have diluted the materiality standard. The Court of Appeals reasoned that materiality was established if the nondisclosed facts would have triggered an inquiry that might have uncovered other unproved and disqualifying facts. See 597 F. 2d 946, 950–951 (CA5 1979). By concluding that the Government has demonstrated the actual existence of disqualifying facts—facts that themselves would have warranted denial of petitioner's citizenship—this Court adheres to a more rigorous standard of proof. I believe that *Chaunt* indeed contemplated only this rigorous standard, and I suspect the Court's reluctance explicitly to apply it stems from a desire to sidestep the confusion over whether *Chaunt* created more than one standard.

Chaunt, to be sure, did announce a disjunctive approach to the inquiry into materiality, but several factors support the conclusion that under either "test" the Government's

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[10] *Schneiderman* v. *United States*, 320 U. S. 118, 122 (1943).

[11] *Nowak* v. *United States*, 356 U. S. 660, 663 (1958).

[12] *Schneiderman* v. *United States*, 320 U. S., at 122.

task is the same: it must prove the existence of disqualifying facts, not simply facts that might lead to hypothesized disqualifying facts. First, this Court's reasoning before *Chaunt* contains no suggestion that a naturalized citizen would be reduced to alien status merely because a thwarted Government inquiry *might* have shown him to be unqualified. Instead, the Court has been willing to approve denaturalization only upon a clear and convincing showing that the prescribed statutory conditions of citizenship had never been met. This, it seems to me, is the clear import of the Court's exhaustive reviews in *Nowak* v. *United States* 356 U. S., at 663–668; *Knauer* v. *United States*, 328 U. S., at 656–669; *Baumgartner* v. *United States*, 322 U. S., at 666–678; and *Schneiderman* v. *United States*, 320 U. S., at 131–159. Of course, the Government's ability to investigate with vigor may be affected adversely by its inability to discover that certain facts have been suppressed. The standard announced by the Court of Appeals, however, seems to me to transform this interest in unhampered investigation into an end in itself. Application of that court's standard suggests that a deliberately false answer to any question the Government deems worth asking may be considered material. I do not believe that such a weak standard of proof was ever contemplated by this Court's decisions prior to *Chaunt*.

Instead, I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its "two tests" are simply two methods by which the existence of ultimate disqualifying facts might be proved. This reading of *Chaunt* is consistent with the actual language of the so-called second test; [13] it

[13] Under the "second test" in *Chaunt*, the Government is required to prove with respect to suppressed facts "that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U. S., at 355. The Court of Appeals in effect construes the word "possibly" to modify the entire following phrase. I believe the sounder construction is that adopted by the District Court, see 455 F. Supp. 893, 915–916 (SD Fla. 1978), whereby

also appears to be the meaning that the dissent in *Chaunt* believed the Court to have intended.[14]

Significantly, this view accords with the policy considerations informing the Court's decisions in the area of denaturalization. If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that cer-

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the word "possibly" modifies only the first part of the ensuing phrase. Because what would "possibly" be discovered is *not* "facts which *might* warrant denial of citizenship" but "*other* facts warranting denial of citizenship" (emphasis supplied), the "second test" simply asks whether knowledge of the suppressed facts could have enabled the Government to reach the ultimate disqualifying facts whose existence is now known. See also 364 U. S., at 353 (second test stated as whether "disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship").

[14] The dissent in *Chaunt* proposed its own standard, which it apparently believed was *at odds* with what the Court had adopted:

"The test is not whether the truthful answer in itself, or the facts discovered through an investigation prompted by that answer, would have justified a denial of citizenship. It is whether the falsification, by misleading the examining officer, forestalled an investigation which *might have resulted* in the defeat of petitioner's application for naturalization." *Id.*, at 357. (Emphasis in original.)

The dissent also voiced concern that the Court, by imposing such a heavy burden of proof on the Government in denaturalization proceedings, in effect would invite dishonesty from future applicants for citizenship. *Ibid.* JUSTICE WHITE in dissent today expresses the same concern. *Post*, at 529. It of course is never easy to demonstrate the existence of statements or events that occurred long ago. Records and witnesses disappear, memories fade, and even the actor's personal knowledge becomes less reliable. While recognizing the arduous nature of the task, the Court nonetheless has insisted that the Government meet a very high standard of proof in denaturalization proceedings. *Chaunt*'s rigorous definition of materiality, it is true, may occasionally benefit an applicant who conceals disqualifying information. Yet, practically and constitutionally, naturalized citizens as a class are not less trustworthy or reliable than the native-born. The procedural protection of the high standard of proof is necessary to assure the naturalized citizen his right, equally with the native-born, to enjoy the benefits of citizenship in confidence and without fear.

tain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion. If the weaker standard were employed, I doubt that the denaturalization process would remain as careful as it has been in the past in situations where a citizen's allegedly material misstatements were closely tied to his expression of political beliefs or activities implicating the First Amendment.[15] Citizenship determinations continue to involve judgments about a person's "good moral character" or his attachment "to the principles of the Constitution," see 8 U. S. C. § 1427 (a), and the judiciary's task remains the difficult one of balancing a need to safeguard admission to United States citizenship, in accord with the will of Congress, against a citizen's right to feel secure in the exercise of his constitutional freedoms. By concluding that an impaired investigation may justify the loss of these freedoms, the Court of Appeals threatens to leave the naturalized citizen with "nothing more than citizenship in attenuated, if not suspended, animation." [16] The Court seems to reject this approach, and follows the essential teaching of *Chaunt*. I regret only its unwillingness to say so.

JUSTICE WHITE, dissenting.

The primary issue presented in the petition for certiorari was whether the Court of Appeals had properly interpreted the test articulated in *Chaunt* v. *United States*, 364 U. S. 350 (1960), for determining whether an individual procured his citizenship by concealment or misrepresentation of a "material" fact. In *Chaunt* the Government sought to revoke an

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[15] Chaunt's prior activities involved distributing handbills and speaking in a public park, activities that merit a high degree of First Amendment protection. See also *Schneiderman* v. *United States*, *supra* (membership in Communist Party in the United States); *Nowak* v. *United States*, *supra* (same).

[16] *Schneiderman* v. *United States*, 320 U. S., at 166 (Rutledge, J., concurring).

individual's citizenship because he had not disclosed certain facts in his application for citizenship.[1] Although *Chaunt* did not address the standard of materiality with respect to visa applications, the parties before this Court have assumed that the *Chaunt* test should be used to determine whether petitioner concealed material facts when he applied for a visa.[2]

Recognizing that the relevance of *Chaunt* to visa applications may be problematic, the majority turns to a wholly separate ground to decide this case, resting its decision on its interpretation of "adopted" § 2 (a) of the Displaced Persons Act (see *ante*, at 510, n. 31). I am reluctant to resolve the issue of whether *Chaunt* extends to visa applications, since the parties have neither briefed nor argued the point. However, I am equally reluctant to adopt the course chosen by the majority, for the language of § 2 (a) is not entirely unambiguous,[3] and the parties have not addresed the proper interpretation of the statute.[4] Under these circumstances, I would

[1] Section 340 (a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1451 (a), quoted in pertinent part in the majority opinion, *ante*, at 493, n. 1, directs the Government to seek revocation of citizenship that was "procured by concealment of a material fact or by willful misrepresentation."

[2] Similarly, both the District Court and the Court of Appeals assumed that the *Chaunt* materiality test should be applied to the Government's claim that petitioner concealed material information when he applied for a visa.

[3] The majority asserts that the plain language of the statute compels the conclusion that § 2 (a) excluded all those who assisted the enemy in persecuting civil populations, even those who involuntarily assisted the enemy. The majority explains in a footnote that under § 2 (a) one must focus on whether the individual assisted the enemy in *persecuting* civil populations, *ante*, at 512–513, n. 34, rather than focusing on voluntariness. Yet one could argue that the words "assist" and "persecute" suggest that § 2 (a) would not apply to an individual whose actions were truly coerced.

[4] The Government did not contend that § 2 (a) of the Displaced Persons Act should be interpreted as excluding persons who *involuntarily* assisted the enemy in persecuting civil populations. Rather, it argued that the

simply clarify the *Chaunt* materiality test and then remand to the Court of Appeals to review the District Court's findings on petitioner's concealment at the time he applied for citizenship.

In *Chaunt* the Court stated that to prove misrepresentation or concealment of a material fact the Government must prove by clear and convincing evidence

> "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U. S., at 355.[5]

Under the District Court's interpretation of the second *Chaunt* test and that urged by petitioner, the Government would be required to prove that an investigation prompted by a complete, truthful response *would have* revealed facts justifying denial of citizenship.[6] The Court of Appeals and the Government contend that under the second *Chaunt* test the Government must prove only that such an investigation *might have* led to the discovery of facts justifying denial of citizenship.[7] In my opinion, the latter interpretation is correct.[8]

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finding that petitioner had "involuntarily" served as a concentration camp guard was clearly erroneous. It therefore urged us to affirm on the ground that the first *Chaunt* test had been satisfied.

[5] In *Chaunt* the Court also observed that complete, honest replies to all relevant questions are essential, not only because concealed facts might in and of themselves justify denial of citizenship but also because "disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship." 364 U. S., at 352–353.

[6] 455 F. Supp. 893, 915–916 (SD Fla. 1978).

[7] 597 F. 2d 946, 951 (CA5 1979).

[8] The Government should be required to prove that an investigation would have occurred if a truthful response had been given, and that the investigation might have uncovered facts justifying denial of citizenship. The defendant could rebut the Government's showing that the investigation might have led to the discovery of facts justifying denial of citizenship by establishing that the underlying facts would not have justified denial of citizenship.

If the District Court's interpretation were adopted, the Government would bear the heavy, and in many cases impossible, burden of proving the true facts that existed many years prior to the time the defendant applied for citizenship, whether it proceeded under the first or the second *Chaunt* test. This definition of "materiality," by greatly improving the odds that concealment would be successful, would encourage applicants to withhold information, since the Government would often be unable to meet its burden by the time the concealment was discovered.

In this case, the Government alleged that when petitioner filled out his application for citizenship, he willfully concealed that he had served as an armed guard for the Germans during the war. Petitioner failed to disclose this information, although the application form required him to list his past or present membership in any organization in the United States or elsewhere, including foreign military service. Although the Government produced evidence to support a finding of materiality under its interpretation of the second *Chaunt* test,[9] the District Court concluded that petitioner's service as an armed guard for the Germans was immaterial under the District Court's interpretation of *Chaunt*. It also found that the nondisclosure was not willful.[10]

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[9] The naturalization examiner who processed petitioner's application testified at trial that if petitioner had disclosed his service as an armed guard with the Germans during the war, the examiner would not have made any recommendation regarding petitioner's application for citizenship until an investigation had been conducted. He also testified that if the investigation had disclosed that petitioner had physicially hurt Jewish prisoners while serving as a guard at Treblinka, the examiner would have recommended that petitioner's application for citizenship be denied, either on the ground that petitioner lacked good moral character or on the ground that he had not been properly admitted into the United States. Waterbury, Conn., Trial Transcript 147–148.

[10] The District Court decided that petitioner's failure to disclose that he had served as an armed guard for the Germans was not willful, since "there would be strong reason in [petitioner's] mind to view himself as a prisoner of war." 455 F. Supp., at 917.

The Court of Appeals failed to review this portion of the District Court's opinion. Instead, it focused solely on whether petitioner had willfully concealed or misrepresented material facts when he applied for a visa. Therefore, I would vacate the judgment of the Court of Appeals and remand the case to that court to review the District Court's application of the *Chaunt* test to petitioner's concealment at the time he applied for citizenship.[11]

JUSTICE STEVENS, dissenting.

The story of this litigation is depressing. The Government failed to prove its right to relief on any of several theories advanced in the District Court. The Court of Appeals reversed on an untenable ground. Today this Court affirms on a theory that no litigant argued, that the Government expressly disavowed, and that may jeopardize the citizenship of countless survivors of Nazi concentration camps.

The seven-count complaint filed by the Government in the District Court prayed for a revocation of petitioner's citizenship on four different theories: (1) that his entry visa was invalid because he had misstated his birthplace and place of residence and therefore he had never been lawfully admitted to the United States; (2) that he committed war crimes or atrocities and therefore was not eligible for admission as a displaced person; (3) that he made material misstatements on his application for citizenship in 1970; and (4) that he was not a person of good moral character when he received his American citizenship. After a long trial, the District Court concluded that the Government had failed to prove its case.

The trial judge was apparently convinced that the suggestive identification procedures endorsed by the prosecution

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[11] I agree with the majority's view that a district court does not have discretion to weigh equitable considerations in determining whether citizenship should be revoked.

had resulted in a misidentification of petitioner; that petitioner had not performed the atrocious acts witnessed by the survivors of Treblinka who testified;[1] that Vice Consul Jenkins' testimony was not entirely reliable;[2] and that for the most part petitioner was a truthful witness. 455 F. Supp. 893, 906–909. The District Judge specifically found that petitioner's visa was valid and that petitioner therefore lawfully entered the United States, *id.*, at 916; that his service at Treblinka was involuntary, *id.*, at 914; that he made no misstatements in his application for citizenship, *id.*, at 917; and that he was a person of good moral character. *Ibid.*

[1] The District Judge's opinion contains a suggestion that the witnesses' identification of petitioner may have been a case of mistaken identity inasmuch as petitioner resembled another guard who had a position of greater authority. See 455 F. Supp. 893, 908.

[2] In view of the extensive references to Jenkins in the Court's opinion, some of the District Court's observations should be quoted:

"Unfortunately, and inexplicably, the Government did not find the Vice-Consul who approved defendant's application.

. . . . .

"Jenkins' testimony about the structure of the death camp organization was hardly expert and conflicts consistently with other evidence presented at the trial. For example, he testified that the Ukrainian guards had the same uniforms as the SS with only slightly different insignia. However, the unanimous testimony was the Germans wore their usual gray-green uniforms but the prisoner-guards didn't. He testified that the camp guards could get leave and get away from the camp and could transfer. The testimony was clear that they could not take leave (and go to Berlin, as Jenkins opined) but could only get a two-to-four-hour pass to visit a small village a couple of miles away.

. . . . .

"Jenkins also would have considered the kapos as excludable because they assisted the Germans. This is totally contrary to the reaction of every witness who survived Treblinka; each of the Israeli witnesses testified the kapos did only what they had to do and the witnesses were quite indignant when asked if they had ever testified against the kapos. The witnesses replied that there was no reason to do so. In addition, Jenkins speculated that the kapos were probably shot in 1945 during a period of retaliation, but the testimony was to the contrary." *Id.*, at 911–913.

As an alternative basis for decision, the District Court concluded that because the Government had failed to prove that petitioner committed any atrocities at Treblinka, his record as a responsible and law-abiding resident of the United States for 29 years provided an equitable ground for refusing to revoke his citizenship. *Id.*, at 918–920.

The Court of Appeals reversed, holding that the District Court committed two errors of law. 597 F. 2d 946. First, the Court of Appeals held that the District Court in assessing the materiality of the misstatement in petitioner's 1949 visa application had misapplied this Court's decision in *Chaunt* v. *United States*, 364 U. S. 355; second, the Court of Appeals rejected the equitable basis for the District Court's judgment. The Court of Appeals did not, however, disturb any of the District Court's findings of fact.

Today the Court declines to endorse the Court of Appeals' first rationale. Because the *Chaunt* test was formulated in the context of applications for citizenship, and because the only misstatements here were made on petitioner's visa application,[3] the Court acknowledges that the *Chaunt* test is not

[3] In Count 4 of its complaint the Government alleged that petitioner did not truthfully answer the question on his citizenship application whether he had ever committed a crime. Having found that his service in Treblinka was not voluntary, the District Court concluded that petitioner's negative answer was truthful. In Count 5 of its complaint (as amended at a pretrial conference) the Government alleged that petitioner had a duty to disclose his guard service at Treblinka in answer to the following question:

"7. List your present and past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and your foreign military service."

The District Court concluded that because petitioner regarded himself as a prisoner of war, and because he had listed his Russian military service, this omission could not be considered willful. See *id.*, at 917. That conclusion was certainly permissible; indeed it is arguable that the Treblinka guard service was neither the sort of "membership" in a club or organization nor the sort of "military service" that the question contemplated.

automatically applicable. The Court does not reach the question of the applicability of *Chaunt* in the visa context, however, because it concludes that at the very least a misrepresentation is material if disclosure of the true facts would have rendered the applicant ineligible for a visa. Because the Court holds as a matter of law that petitioner's service as a guard at Treblinka, whether or not voluntary, made him ineligible for a visa, petitioner was not legally admitted to the country and hence was not entitled to citizenship.

I cannot accept the view that any citizen's past involuntary conduct can provide the basis for stripping him of his American citizenship. The Court's contrary holding today rests entirely on its construction of the Displaced Persons Act of 1948 (DPA). Although the Court purports to consider the materiality of petitioner's misstatements, the Court's construction of the DPA renders those misstatements entirely irrelevant to the decision of this case. Every person who entered the United States pursuant to the authority granted by that statute, who subsequently acquired American citizenship, and who can be shown "to have assisted the enemy in persecuting civil populations"—even under the most severe duress—has no right to retain his or her citizenship. I believe that the Court's construction of the DPA is erroneous and that the Court of Appeals misapplied the *Chaunt* test.

I

Section 2 (a) of the DPA was "adopted" from the Constitution of the International Refugee Organization (see *ante*, at 510, n. 31), which described in Part II of Annex I "Persons who will not be [considered as displaced persons]." The second listing had two classifications:

> "2. Any other persons who can be shown:
>
> "(*a*) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

"(*b*) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."

The District Court recognized that the section dealing with assisting enemy forces contained the word "voluntarily," while the section dealing with persecuting enemy populations did not. The District Court refused to construe the statute to bar relief to any person who assisted the enemy, whether voluntarily or not, however, because such a construction would have excluded the Jewish prisoners who assisted the SS in the operation of the concentration camp. 455 F. Supp., at 913. These prisoners performed such tasks as cutting the hair of female prisoners prior to their execution and performing in a camp orchestra as a ruse to conceal the true nature of the camp. I agree without hesitation with the District Court's conclusion that such prisoners did not perform their duties voluntarily and that such prisoners should not be considered excludable under the DPA.[4] The Court resolves the dilemma perceived by the District Court by concluding that prisoners who did no more than cut the hair of female inmates before they were executed could not be considered to be assisting the enemy in *persecuting* civilian populations. See *ante*, at 512–513, n. 34. Thus the Court would give the word "persecution" some not yet defined specially limited reading. In my opinion, the term "persecution" clearly applies to such conduct; indeed, it probably encompasses almost every aspect of life or death in a concentration camp.

The Court's resolution of this issue is particularly unper-

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[4] One particular squad of Jewish prisoners was responsible for undressing the aged and infirm prisoners and leading them to the lazaret, the eternally burning pit, where they were shot. Record 287 (Kohn). One of the prisoners who worked in the camp stated when asked whether this squad "assist[ed] in bringing [prisoners] to their death": "We automatically assisted, all of us, but . . . it was under the fear and terror." *Id.*, at 293 (Kohn).

suasive when applied to the "kapos," the Jewish prisoners who supervised the Jewish workers at the camp. According to witnesses who survived Treblinka, the kapos were commanded by the SS to administer beatings to the prisoners, and they did so with just enough force to make the beating appear realistic yet avoid injury to the prisoner. Record 293–295, 300–302 (Kohn), 237 (Turowski).[5] Even if we assume that the kapos were completely successful in deceiving the SS guards and that the beatings caused no injury to other inmates, I believe their conduct would have to be characterized as assisting in the persecution of other prisoners.[6] In my view, the reason that such conduct should not make the kapos ineligible for citizenship is that it surely was not voluntary. The fact that the Court's interpretation of the DPA would exclude a group whose actions were uniformly defended by survivors of Treblinka, *id.*, at 236–239 (Turowski), 300 (Kohn), 1157–1159 (Epstein), merely underscores the strained reading the Court has given the statute.[7]

The Government was apparently persuaded by the force of the District Court's reasoning. In the Court of Appeals the Government unequivocally accepted the District Court's

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[5] Two of the witnesses, Czarny and Boraks, testified that they did not recall or hear of any kapos beating prisoners, *id.*, at 551, 686, and one witness, Epstein, did not see or hear of beatings inflicted by kapos. *Id.*, at 1159.

[6] Moreover, the Court's distinction between the kapos and other Jewish workers on the one hand and the Ukranian guards on the other is based in large part on such factors as the issuance of a uniform and weapons, the receipt of a stipend, and the privilege of being allowed to leave the camp and visit a nearby village. These supposedly distinguishing factors are essentially unrelated to the persecution of the victims of the concentration camp.

[7] We also note that Vice Consul Jenkins, upon whose testimony the Court heavily relies, indicated that he would have considered kapos to be ineligible under the DPA if they could be proved to be "internal camp inmate collaborators." *Id.*, at 828.

view that § 2 (a) should be construed to read "persons who can be shown to have *voluntarily* assisted the enemy." [8] The Government did not retreat from that concession before this Court.[9] The reasons for agreeing with the Government's interpretation of the statute are compelling.

II

If the DPA is correctly construed, petitioner is entitled to retain his citizenship unless the Government proved that he made a material misstatement in his application for citizenship in 1970 or that he was ineligible for citizenship in 1970. Given the District Court's findings that he made no willful misstatement in 1970 and that he had not committed any crimes because his service at Treblinka was involuntary, the challenge to his citizenship rests entirely on the claim that he was not lawfully admitted to the United States in 1949 because he made material misstatements in his visa application. Even if the *Chaunt* test applies equally to visa applications and citizenship applications, I would hold that the Government failed to satisfy its burden under what I believe to be the proper interpretation of that test.

The Court and the parties seem to assume that the *Chaunt* test contains only two components: (1) whether a truthful answer might have or would have triggered an investigation, and (2) whether such an investigation might have or would

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[8] Emphasis added. Footnote 11 on p. 17 of the Government's brief in the Court of Appeals states:

"The district court held that, in Section 2 (a), 'persons who can be shown to have assisted the enemy' should be construed to read 'persons who can be shown to have voluntarily assisted the enemy.' 455 F. Supp., at 913. The United States has no quarrel with such a construction in this case."

[9] Inasmuch as the Attorney General of the United States argued this case himself, presumably the decision not to question the District Court's construction of the statute was reached only after the matter had been reviewed with the utmost care.

have revealed a disqualifying circumstance. Under this characterization of the *Chaunt* test, the only dispute is what probability is required with respect to each of the two components. There are really three inquiries, however: (1) whether a truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. Regardless of whether the missstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and attach little or no weight to the third. Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated. But if the Government can establish the existence of a disqualifying fact, I would consider a willful misstatement material if it were more probable than not that a truthful answer would have prompted more inquiry. Thus I would presume that an investigation, if begun at the time that the misstatement was made, would have been successful in finding whatever the Government is now able to prove. But if the Government is not able to prove the existence of facts that would have made the resident alien ineligible for citizenship at the time he executed his application, I would not denaturalize him on the basis of speculation about what might have been true years ago.

The Government in this case failed to prove that petitioner materially misrepresented facts on his citizenship application. Because I do not believe that "adopted" § 2 (a) of the DPA applies to persons whose assistance in the persecution of civilian populations was involuntary, and because the District Court found that petitioner's service was not voluntary, it necessarily follows that the Government failed to prove the existence of a disqualifying circumstance with respect to peti-

tioner's visa application.[10] The misstatements in that application were therefore not material under a proper application of *Chaunt*.

The gruesome facts recited in this record create what Justice Holmes described as a sort of "hydraulic pressure" that tends to distort our judgment. Perhaps my refusal to acquiesce in the conclusion reached by highly respected colleagues is attributable in part to an overreaction to that pressure. Even after recognizing and discounting that factor, however, I remain firmly convinced that the Court has committed the profoundest sort of error by venturing into the unknown to find a basis for affirming the judgment of the Court of Appeals. That human suffering will be a consequence of today's venture is certainly predictable; that any suffering will be allayed or avoided is at best doubtful.

I respectfully dissent.

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[10] Under my interpretation of the *Chaunt* test, the Government should not prevail on the speculation that it might have been able to uncover evidence that petitioner committed war crimes while at Treblinka. Similarly, I would hold that the District Court's findings with respect to willfulness of alleged misstatements on petitioner's citizenship application were not clearly erroneous. See n. 2, *supra*. I surely would not rest decision in this Court on a *de novo* evaluation of the testimony of the witness Jenkins rather than the findings of the District Court.

Syllabus

SUMNER, WARDEN *v.* MATA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–1601. Argued December 9, 1980—Decided January 21, 1981

Respondent was convicted of first-degree murder in a California state court after a trial at which eyewitnesses identified him as participating in the murder. The California Court of Appeal affirmed, rejecting respondent's contention, made for the first time, that the pretrial photographic identification employed by the police violated his Fourteenth Amendment due process rights. The court concluded upon review of the trial record that "the facts of the present case" did not adequately support respondent's claim. Respondent did not seek review by the California Supreme Court, but later raised the pretrial identification issue in state habeas corpus proceedings, which resulted in denial of relief by the trial court, the California Court of Appeal, and the California Supreme Court. Respondent then sought federal habeas corpus relief pursuant to 28 U. S. C. § 2254, but the Federal District Court denied the petition. The United States Court of Appeals, employing the same standard used by the state courts, reversed. On the basis of findings considerably at odds with the findings of the California Court of Appeal, the United States Court of Appeals, after reviewing the state-court trial record, concluded that the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The Court of Appeals' opinion did not refer to 28 U. S. C. § 2254 (d), which provides that in federal habeas corpus proceedings instituted by a state prisoner "a determination after a hearing on the merits of a factual issue" made by a state court of competent jurisdiction and "evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct" unless one of seven specified conditions is found to exist or unless the habeas court concludes that the relevant state-court determination "is not fairly supported by the record."

Held: The Court of Appeals did not properly analyze respondent's challenge to his state-court conviction, given the limited nature of the review provided federal courts by § 2254. Pp. 543–552.

(a) Section 2254 (d) applies to factual determinations made by state courts, whether the court be a trial court or an appellate court. The California Court of Appeal held a "hearing" within the meaning of

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§ 2254 (d), since both respondent and the State were formally before the court, respondent was given an opportunity to be heard, and his claim received plenary consideration. The interest in federalism recognized by Congress in enacting § 2254 (d) requires deference by federal courts to factual determinations of all state courts, and this is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court and where there was no reason for the state trial court to consider the issue because respondent failed to raise it at that level. Pp. 545–547.

(b) Given the applicability of § 2254 (d) to the present case, it is not apparent that the Court of Appeals, whose opinion gave no indication that § 2254 was even considered, applied the "presumption of correctness" which is mandated by the statute to the factual determinations made by the California state court. When Congress provided in § 2254 (d) that a habeas court could *not* dispense with the "presumption of correctness" embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references (not present here) to § 2254 (d) and the state-court findings. Pp. 547–549.

(c) In providing in § 2254 (d) that absent any of the enumerated factors, the burden rests on the habeas petitioner to establish "by convincing evidence that the factual determination of the State court was erroneous," Congress meant to insure that a state finding not be overturned merely on the basis of the usual "preponderance of the evidence" standard. To ensure that this mandate of Congress is enforced, a federal habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record." Pp. 550–552.

611 F. 2d 754, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. BLACKMUN, J., filed a statement concurring in the result, *post*, p. 552. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 552.

Thomas A. Brady, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *George Deukmejian*, Attorney General, *Robert H. Phili-*

bosian, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, and *Gloria F. DeHart*, *Derald E. Granberg* and *Jamie Jacobs-May*, Deputy Attorneys General.

Ezra Hendon, by appointment of the Court, *post*, p. 815, argued the cause for respondent. With him on the brief was *Quin Denver*.

JUSTICE REHNQUIST delivered the opinion of the Court.

A divided Court of Appeals for the Ninth Circuit held that respondent's state-court murder conviction was constitutionally invalid. Its holding has two bases: (1) the pretrial photographic identification procedure employed by state police was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable in-court misidentification of the [respondent]"; and (2) the admission of the in-court identification "constituted error of constitutional dimension." 611 F. 2d 754, 755 (1979). The question before us is whether the Court of Appeals properly analyzed respondent's challenge to his state-court murder conviction, given the limited nature of the review provided federal courts by 28 U. S. C. § 2254.

I

In 1973, respondent was convicted in the Superior Court of Kern County, Cal., of the first-degree murder of one of his fellow inmates at a California correctional institution. At trial, three witnesses testified that they had witnessed all or part of the attack on the inmate and identified respondent as participating in the murder. Respondent offered as an alibi three other witnesses who testified that respondent was in bed at the time the stabbing occurred. At no point did respondent object to his in-court identification by the State's three eyewitnesses.

On direct appeal to the California Court of Appeal, respondent claimed for the first time that the pretrial photographic identification employed by the state police violated

the due process of law guaranteed him by the Fourteenth Amendment of the United States Constitution. The California Court of Appeal analyzed his contention under the test earlier enunciated by this Court in *Simmons* v. *United States*, 390 U. S. 377 (1968). The court explained that each case must be considered on its own facts and a violation of due process will occur and a conviction will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The California court then rejected respondent's contention, in this language:

> "Reviewing the facts of the present case to determine if the particular photographic identification procedure used contained the proscribed suggestive characteristics, we first find that the photographs were available for cross-examination purposes at the trial. We further find that there is no showing of influence by the investigating officers[;] that the witnesses had an adequate opportunity to view the crime; and that their descriptions are accurate. The circumstances thus indicate the inherent fairness of the procedure, and we find no error in the admission of the identification evidence." App. to Pet. for Cert. C–4—C–5.

Respondent did not seek direct review of the California Court of Appeal's decision with the California Supreme Court. He did, however, later raise the pretrial identification issue in state habeas corpus proceedings. The California Superior Court, the California Court of Appeal, and the California Supreme Court all denied relief.

On December 9, 1977, respondent filed a petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254 in the United States District Court for the Northern District of California and again raised the pretrial identification issue. On May 23, 1978, the District Court denied the petition and re-

spondent appealed this order to the United States Court of Appeals for the Ninth Circuit.

The Court of Appeals for the Ninth Circuit reversed. The court, employing the same standard used by the California state courts, concluded "the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F. 2d, at 759. This conclusion was based, *inter alia*, on the court's finding that (1) the circumstances surrounding the witnesses' observation of the crime were such that there was a grave likelihood of misidentification; (2) the witnesses had failed to give sufficiently detailed descriptions of the assailant; and (3) considerable pressure from both prison officials and prison factions had been brought to bear on the witnesses. *Id.*, at 758–759.

II

The findings made by the Court of Appeals for the Ninth Circuit are considerably at odds with the findings made by the California Court of Appeal. Both courts made their findings after reviewing the state-court trial record and neither court has indicated that this record is not a completely adequate record upon which to base such findings.

If this were simply a run-of-the-mine case in which an appellate court had reached an opposite conclusion from a trial court in a unitary judicial system, there would be little reason for invocation of this Court's discretionary jurisdiction to make a third set of findings. But unfortunately for the smooth functioning of our federal system, which consists of 50 state judicial systems and one national judicial system, this is not such a run-of-the-mine case. Instead, this case presents important questions regarding the role to be played by the federal courts in the exercise of the habeas corpus jurisdiction conferred upon them by 28 U. S. C. § 2254.

It has long been established, as to those constitutional issues which may properly be raised under § 2254, that even a single

federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question. As might be imagined, this result was not easily arrived at under the Habeas Corpus Act of 1867, the predecessor to 28 U. S. C. § 2254. But the present doctrine, adumbrated in the Court's opinion in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), and culminating in this Court's opinion in *Fay* v. *Noia*, 372 U. S. 391 (1963), is that the Act of 1867 allows such collateral attack.

The petitioner asserts that in reaching its decision the majority of the Court of Appeals for the Ninth Circuit failed to observe certain limitations on its authority specifically set forth in 28 U. S. C. § 2254 (d). Section 2254 (d) provides:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> "(1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> "(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> "(3) that the material facts were not adequately developed at the State court hearing;
>
> "(4) that the State court lacked jurisdiction of the

subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

It is obvious from a literal reading of the above that § 2254 (d) is applicable to the present situation although it has been contended that this should not be the case where a state appellate court, as opposed to a trial court, makes the

pertinent factual findings. We, however, refuse to read this limitation into § 2254 (d).[1] Admittedly, the California Court of Appeal made the factual determinations at issue here and it did so after a review of the trial court record. Nevertheless, it clearly held a "hearing" within the meaning of § 2254 (d). Both respondent and the State were formally before the court. Respondent was given an opportunity to be heard and his claim received plenary consideration even though he failed to raise it before the trial court. After respondent presented his case to the state appellate court, that court concluded in a written opinion that "the facts of the present case" did not adequately support respondent's claim. Since that court was requested to determine the issue by respondent, we do not think he may now be heard to assert that its proceeding was not a "hearing" within the meaning of § 2254 (d).

Section 2254 (d) applies to cases in which a state court of competent jurisdiction has made "a determination after a hearing on the merits of a factual issue." It makes no distinction between the factual determinations of a state trial court and those of a state appellate court. Nor does it specify any procedural requirements that must be satisfied for there to be a "hearing on the merits of a factual issue," other than that the habeas applicant and the State or its agent be parties to the state proceeding and that the state-court determination be evidenced by "a written finding, written

[1] This Court previously reserved the question in *Cuyler* v. *Sullivan*, 446 U. S. 335, 341, n. 5 (1980). The Courts of Appeals, without extensive analysis, have reached differing conclusions as to whether findings of fact made by a state appellate court can be considered "determination[s] after a hearing on the merits of a factual issue" within the meaning of 28 U. S. C. § 2254 (d). Compare *Drayton* v. *Hayes*, 589 F. 2d 117, 122, n. 9 (CA2 1979); *White* v. *Finkbeiner*, 570 F. 2d 194, 201 (CA7 1978), appeal after remand, 611 F. 2d 186 (1979); *Payne* v. *Cardwell*, 436 F. 2d 577 (CA6 1971); *Hill* v. *Nelson*, 466 F. 2d 1346, 1348 (CA9 1972), with *Souza* v. *Howard*, 488 F. 2d 462 (CA1 1973); and *United States ex rel. Harris* v. *Illinois*, 457 F. 2d 191 (CA7 1972).

opinion, or other reliable and adequate written indicia." Section 2254 (d) by its terms thus applies to factual determinations made by state courts, whether the court be a trial court or an appellate court. Cf. *Swenson* v. *Stidham*, 409 U. S. 224, 230 (1972). This interest in federalism recognized by Congress in enacting § 2254 (d) requires deference by federal courts to factual determinations of all state courts. This is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court and where there was no reason for the state trial court to consider the issue because respondent failed to raise the issue at that level. See *Souza* v. *Howard*, 488 F. 2d 462 (CA1 1973). In fact, if the state appellate court here had declined to rule on the "identification" issue because it had not been properly raised in the trial court, the federal court would have been altogether barred from considering it absent a showing of "cause" and "prejudice." *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

Given the applicability of § 2254 (d) to the present case, it is apparent that the Court of Appeals for the Ninth Circuit did not apply the "presumption of correctness" which is mandated by the statute to the factual determinations made by the California state courts. Indeed, the court did not even refer in its opinion to § 2254 (d).[2] Last Term we denied

[2] The dissent contends that any argument premised on § 2254 (d) was "abandoned" because petitioner raised his § 2254 (d) argument before the District Court, but did not do so in his appellate brief. *Post*, at 554. Presumably this contention does not mean to imply that petitioner conceded error with regard to the state-court factual determinations, but instead that he "abandoned" his right to rely on § 2254 (d) as a reason for *not* rejecting these factual determinations. Whether or not the petitioner specifically directed the Court of Appeals' attention to § 2254 (d) makes no difference as to the outcome of this case. The present codification of the federal habeas statute is the successor to "the first congressional grant of jurisdiction to the federal courts," *Preiser* v. *Rodriguez*, 411 U. S. 475, 485 (1973), and the 1966 amendments embodied in § 2254 (d) were in-

certiorari in *Lombard* v. *Taylor*, 445 U. S. 946 (1980), in which a New York prosecutor sought certiorari from a judgment of the Court of Appeals for the Second Circuit. That court had held in a § 2254 action that the habeas petitioner had been the victim of knowing use of perjured testimony at his trial, and reversed the District Court's refusal to grant the writ. In that case, however, the Federal Court of Appeals indicated in the course of its opinion full awareness of § 2254 (d), and after an examination of the same documentary evidence on which the state court relied, it expressly concluded that the state-court finding to the contrary was not entitled to deference by reason of § 2254 (d). *Taylor* v. *Lombard*, 606 F. 2d 371, 375 (1979). The approach of the Court of Appeals for the Ninth Circuit in the instant case was quite different. Its only reference to the previous state-court decision and collateral proceedings was to state in one sentence that "[t]he Petition followed the appellant's conviction of murder in a California state court and his exhaustion of all available state court remedies." 611 F. 2d, at 755. From this statement, its opinion went directly to a discussion of the "facts" and constitutional merits of the respondent's claims.

Undoubtedly, a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit. This, however, was not the situation presented here. To the contrary, the Court of Appeals reached a conclusion which was in conflict with the conclusion reached by every other state and federal judge after reviewing the

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tended by Congress as limitations on the exercise of that jurisdiction. As we held in *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908), and have repeatedly since reaffirmed, "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." Having had the benefit of the full briefing and argument from the parties on the § 2254 (d) issue, we are simply following the well-established doctrine of the *Mottley* case in deciding the § 2254 (d) issue.

exact same record. Reading the court's opinion in conjunction with § 2254 (d), it is clear that the court could not have even implicitly relied on paragraphs 1 through 7 of § 2254 (d) in reaching its decision. It is impossible to tell whether the majority of the court relied on paragraph 8 because its opinion gives no indication that § 2254 was even considered.

Obviously, if the Court of Appeals in this case or any other court of appeals had simply inserted a boilerplate paragraph in its opinion that it had considered the state record as a whole and concluded that the state appellate court's factual determinations were not fairly supported by the record, this objection to the judgment of the Court of Appeals could not as easily be made. Just as obviously, this would be a frustration of the intent of Congress in enacting § 2254 (d). Reference can be made to Rule 52 of the Federal Rules of Civil Procedure which requires a United States district court following a bench trial to "find the facts specially and state separately its conclusions of law thereon . . . ." It is a matter of common knowledge that on some occasions a district judge will simply take findings of fact and conclusions of law prepared by the party whom the judge has indicated at the close of trial shall prevail and without alteration adopt them as his own. However, a requirement such as is imposed by Rule 52 undoubtedly makes a judge more aware that it is his own *imprimatur* that is placed on the findings of fact and conclusions of law, whoever may prepare them. When Congress provided in § 2254 (d) that a habeas court could *not* dispense with the "presumption of correctness" embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to § 2254 (d) and the state-court findings. State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office.

Federal habeas has been a source of friction between state and federal courts, and Congress obviously meant to alleviate some of that friction when it enacted subsection (d) in 1966 as an amendment to the original Federal Habeas Act of 1867. Accordingly, some content must be given to the provisions of the subsection if the will of Congress be not frustrated. Since the 1966 amendment, this Court has had few opportunities to address the various provisions of subsection (d), and never in a context similar to the one presented here. See, *e. g.*, *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980); *LaVallee* v. *Delle Rose*, 410 U. S. 690 (1973). A writ issued at the behest of a petitioner under 28 U. S. C § 2254 is in effect overturning either the factual or legal conclusions reached by the state-court system under the judgment of which the petitioner stands convicted, and friction is a likely result. The long line of our cases previously referred to accepted that friction as a necessary consequence of the Federal Habeas Act of 1867, 28 U. S. C. § 2254. But it is clear that in adopting the 1966 amendment, Congress in § 2254 (d) intended not only to minimize that inevitable friction but also to establish that the findings made by the state-court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in § 2254 (d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the *habeas* court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish *by convincing evidence* that the factual determination by the State court was erroneous." (Emphasis supplied.) [3]

[3] In addition to minimizing the "friction" between the state and federal courts, the limited nature of the review provided by § 2254 also serves the interest that both society and the individual criminal defendant have "in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v.

Although arising in a much different context, we think the recent language used in *Addington* v. *Texas*, 441 U. S. 418 (1979), has no little bearing on the issue here:

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Id.*, at 423.

When it enacted the 1966 amendment to 28 U. S. C. § 2254, Congress specified that in the absence of the previously enumerated factors one through eight, the burden shall rest on the habeas petitioner, whose case by that time had run the entire gamut of a state judicial system, to establish "by convincing evidence that the factual determination of the State court was erroneous." 28 U. S. C. § 2254 (d). Thus, Congress meant to insure that a state finding not be overturned merely on the basis of the usual "preponderance of the evidence" standard in such a situation. In order to ensure that this mandate of Congress is enforced, we now hold that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record." Such a statement tying the generalities of § 2254 (d) to the particular facts of the case at hand will not, we think, unduly burden federal habeas courts even though it will prevent the use of the "boilerplate" language to which we

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United States, 373 U. S. 1, 24–25 (1963) (Harlan, J., dissenting). See also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 262 (1973) (POWELL, J., concurring).

have previously adverted. Moreover, such a statement will have the obvious value of enabling courts of appeals and this Court to satisfy themselves that the congressional mandate has been complied with. No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254 (d). Cf. *Greater Boston Television Corp.* v. *FCC*, 143 U. S. App. D. C. 383, 444 F. 2d 841, 851 (1970)

Having said this, we are not to be understood as agreeing or disagreeing with the majority of the Court of Appeals on the merits of the issue of impermissibly suggestive identification procedures. Both the California courts and the federal courts relied on the basic *Simmons* case for their legal analysis. Applying the same test, the majority of the Court of Appeals for the Ninth Circuit reached a different determination than had all the other courts which considered the issue. Assuredly this is not the first nor the last time that such a result will occur. We do think, however, that Congress was intent on some sort of written explanation of the § 2254 (d) factors when such a result does occur. The judgment of the Court of Appeals for the Ninth Circuit is accordingly vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN concurs in the result. He would vacate the judgment of the Court of Appeals and merely remand the case to that court for reconsideration in light of 28 U. S. C. § 2254 (d).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, dissenting.

The Court holds today that an order of a federal habeas court requiring release or retrial of a state prisoner because of constitutional violations at his trial must be vacated if the

court does not explain in its order why 28 U. S. C. § 2254 (d) does not bar re-examination of issues decided by the state courts—even if the State did not contest the order on the ground of § 2254 (d), and even if § 2254 (d) is plainly inapplicable under decisions of this Court. I dissent.

I

Respondent was convicted of first-degree murder of another prisoner, largely on the strength of identification testimony by three fellow inmates at a California penitentiary. Two of these witnesses had been shown photo identification arrays on three occasions, under circumstances that led the United States Court of Appeals for the Ninth Circuit to conclude that it was "obvious that there was a grave likelihood of irreparable misidentification." 611 F. 2d 754, 758 (1979). Respondent did not object at trial to admission of this identification testimony. On appeal to the California Court of Appeal, respondent argued that the use of this identification evidence violated his due process rights as defined in *Simmons* v. *United States*, 390 U. S. 377 (1968). The court considered this claim on the merits, and rejected it.

Respondent did not seek review in the California Supreme Court. Instead, he raised the pretrial identification issue in state habeas corpus proceedings, where his petitions were denied without opinion. Finally, he filed a petition for habeas corpus under 28 U. S. C. § 2254 in the United States District Court for the Northern District of California, again raising the pretrial identification issue. In his return in opposition to respondent's petition for habeas corpus, petitioner argued that the District Court was precluded from re-examining the issue by virtue of § 2254 (d), which accords a presumption of correctness to state-court factual findings, subject to certain exceptions not relevant here.[1] The District Court denied the petition on its merits, without referring to

[1] See *ante*, at 544–545.

§ 2254 (d). Respondent appealed to the Court of Appeals for the Ninth Circuit, where petitioner abandoned his § 2254 (d) argument. That court reversed on the merits, finding that respondent's due process rights had been violated by the pretrial identification procedures. It did not refer to § 2254 (d). Petitioner then filed a motion for rehearing and suggestion for rehearing en banc, this time including a one-sentence argument that § 2254 (d) barred the federal court from reaching the pretrial identification issue. The Court of Appeals denied these motions without discussion.

II

I cannot join my Brethren in concluding that the Court of Appeals' decision must be vacated for its failure to discuss an issue *not timely raised by petitioner*. This Court today holds that a federal habeas court may not grant a petition for a writ without stating on the record why it was not bound by § 2254 (d) to defer to the state-court judgment. *Ante*, at 551. It therefore vacates the judgment of the Court of Appeals in this case, even though petitioner failed to raise the § 2254 (d) argument in his briefs before that court. The Court admits that "a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit." *Ante*, at 548. To that I would add that, except in exceptional circumstances, a court need not search the universe of legal argument and discuss every contention that might have been—but was not—made by the losing party. The burden on the dockets of the federal courts is severe enough already, without requiring the courts to raise, research, and explain an issue not deemed important enough by the parties to justify mention in their briefs.

Moreover, I cannot agree that today's holding will "ensure that this mandate of Congress [§ 2254 (d)] is enforced," *ante*, at 551; rather, it is more likely to be seen as an invitation to lower federal courts to "inser[t] a boilerplate paragraph" in their opinions acknowledging their awareness of § 2254 (d).

See *ante*, at 549.[2] The requirement is as useless as it is disruptive.

III

The Court's disposition of the instant case is all the more perplexing because § 2254 (d) plainly constitutes no bar to the Court of Appeals' holding that the pretrial identification procedure employed by the police violated respondent's due process rights. Section 2254 (d) requires a federal habeas court to defer to "a determination after a hearing on the merits of a *factual issue*, made by a State court . . . ." 28 U. S. C. § 2254 (d) (emphasis supplied). The factual issues to which § 2254 (d) applies are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . .'" *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980) (quoting *Townsend* v. *Sain*, 372 U. S. 293, 309, n. 6 (1963)). Section 2254 (d) does not bar a federal court from reviewing "a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case." 446 U. S., at 342; see *Brewer* v. *Williams*, 430 U. S. 387, 403–404 (1977).

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[2] The Court admits that the decision in *Taylor* v. *Lombard*, 606 F. 2d 371 (CA2 1979), cert. denied, 445 U. S. 946 (1980), would be sustained under the rule announced today. *Ante*, at 547–548. The sole discussion of § 2254 (d) by the Court of Appeals for the Second Circuit in *Taylor* was its conclusory statement: "The County Court's finding that there was no factual basis for the claim of perjury is not fairly supported by the record, and therefore is not entitled to deference. 28 U. S. C. § 2254 (d) (8)." 606 F. 2d, at 375. On the basis of this statement, we no more know whether the Court of Appeals for the Second Circuit correctly applied § 2254 (d) in *Taylor* than we know whether the Court of Appeals for the Ninth Circuit correctly applied it in the instant case. Admittedly, the Second Circuit opinion manifested "full awarenesss" of the existence of § 2254 (d), see *ante*, at 548, but it nevertheless "left [us] to guess as to [its] reasons for granting relief notwithstanding the provisions of § 2254 (d)." See *ante*, at 552. I would be content to presume that federal judges are fully aware of so prominent a statute as § 2254 (d), and to leave them free to devote their energies to writing opinions concerning contested issues.

What factual determinations did the Court of Appeals for the Ninth Circuit disregard? The court did not conduct an evidentiary hearing on the pretrial identification procedures, but relied on the same state trial court record relied upon by the California Court of Appeal. My examination of the opinions of the two courts does not reveal a single disagreement over a "basic, primary, or historical fact."

The treatment of the pretrial identification issue by the California court was brief and contained little in the way of formal factual findings. Its relevant findings were that "the witnesses had an adequate opportunity to view the crime"; that "there is no showing of influence by the investigating officers"; and that the witnesses' "descriptions are accurate." App. to Pet. for Cert. C–4 to C–5. The Court of Appeals for the Ninth Circuit explicitly agreed that the witnesses had "an opportunity . . . to observe the perpetrators of the crime," 611 F. 2d, at 758, but disagreed with the California court's *legal* conclusion that the opportunity for observation was constitutionally adequate, because of the "diversion of the witnesses' attention at the time the crime was committed." *Id.*, at 759. Similarly, the Court of Appeals' description of the facts concerning the photographic lineup procedure differs in no significant detail from that offered by the California court. Compare *id.*, at 756, with App. to Pet. for Cert. C–3 to C–4. The California court, however, concluded that "[t]he circumstances thus indicate the inherent fairness of the procedure," *id.*, at C–5, while the Court of Appeals reached the opposite legal conclusion. The Court of Appeals, like the California court, did not dispute the *accuracy* of the witnesses' identifications, but only their degree of detail. 611 F. 2d, at 758. Finally the Court of Appeals considered whether using a photo array procedure rather than a lineup was necessary, a consideration not deemed relevant by the California court. *Id.*, at 757.

Plainly, the disagreement between the courts is over the constitutional significance of the facts of the case, and not

over the facts themselves. Whether a witness' opportunity to view a crime is "adequate" for constitutional purposes, whether a particular course of conduct by state police raises a possibility of irreparable misidentification serious enough to violate constitutional standards, whether a witness' description is sufficiently detailed to dispel doubt about the procedures imposed, and whether the necessity for a photographic identification procedure is constitutionally significant are examples of questions of law, or at least mixed questions of fact and law. The questions addressed by the Court of Appeals for the Ninth Circuit required the " 'application of constitutional principles to the facts as found,' " *Brewer* v. *Williams, supra,* at 403 (quoting *Brown* v. *Allen,* 344 U. S. 443, 507 (1953) (opinion of Frankfurter, J.)), and thus fall outside the limitations of § 2254 (d).

Indeed, this Court has held, in a case similar on its facts to this one, that a dispute over allegedly suggestive pretrial identification procedures is "not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil* v. *Biggers,* 409 U. S. 188, 193, n. 3 (1972). Cf. *Cuyler* v. *Sullivan, supra,* at 342 (conclusion that lawyers undertook multiple representation not a "factual" determination within the meaning of § 2254 (d)); *Brewer* v. *Williams, supra,* at 395–397, 402–404 (conclusion that defendant waived his right to counsel not a "factual" determination within the meaning of § 2254 (d)).

In *Biggers,* the District Court and the Court of Appeals for the Sixth Circuit, applying the "totality of the circumstances" test of *Simmons* v. *United States,* 390 U. S. 377 (1968), both concluded that pretrial identification procedures had violated a state prisoner's due process rights. This Court reversed, over a dissent claiming that the Court was violating its "long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous." *Neil* v. *Biggers, supra,* at 202 (BRENNAN, J., joined by Douglas and STEWART, JJ., dissenting).

The Court rejected the dissenters' argument on the basis of its conclusion that application of the "totality of the circumstances" test to the undisputed primary facts in the trial court record did not constitute a factual finding. 409 U. S., at 193, n. 3. The instant case is indistinguishable. It is cruelly ironic that the Court would hold the constitutionality of pretrial identification procedures to be a question of law when the effect is to vacate a decision in favor of a prisoner whose incarceration had been held unconstitutional by lower courts, but would reject the same conclusion when the effect would be to vindicate such a prisoner's constitutional rights.

On the merits, petitioner contends that the "Ninth Circuit's application of an *erroneous standard* led it to an *erroneous result* and that application of the *proper standard* must lead to a conclusion that [respondent] was not denied due process by reason of the admission of identification evidence at his trial." Brief for Petitioner 49 (emphasis supplied); see also *id.*, at 14.[3] Thus, petitioner's very argument reveals that the difference between the Court of Appeals for the Ninth Circuit and the California Court of Appeal was over the applicable *legal standard*, and not over the particular *facts* of the case. And § 2254 (d) surely does not detract from the well-established duty of federal courts "to apply the applicable federal law to the state court fact findings independ-

[3] In particular, petitioner argues that the Court of Appeals for the Ninth Circuit's consideration of the necessity for using pretrial photo displays was in conflict with this Court's precedents. Brief for Petitioner 31. The Court of Appeals has held that the necessity for the use of a photographic display is an important factor in judging the validity of pretrial identification procedures, though lack of necessity is not a *per se* ground for rejecting the identification. 611 F. 2d, at 757; see *United States* v. *Calhoun*, 542 F. 2d 1094, 1104 (CA9 1976), cert. denied, 429 U. S. 1064 (1977). The California Court of Appeal did not consider the necessity for the use of the photographic displays, and thus did not apply the same legal standard to the pretrial identification question. App. to Pet. for Cert. C–4 to C–5; see *People* v. *Suttle*, 90 Cal. App. 3d 572, 580–581, 153 Cal. Rptr. 409, 414–415 (1979).

ently." *Townsend* v. *Sain*, 372 U. S., at 318. A federal court need not—indeed, must not—defer to the state court's interpretation of federal law. *Ibid.*; see *ante*, at 543–544.[4] In view of this, I cannot understand how the Court today can conclude that "[i]t is obvious from a literal reading of [§ 2254 (d)] that § 2254 (d) is applicable to the present situation . . . ." *Ante*, at 545. To me, it is just as obvious that § 2254 (d) is not applicable.

IV

The Court does not challenge the correctness of the Court of Appeals' conclusion that the pretrial identification procedure employed by the state police in this case was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F. 2d, at 759. It is therefore not necessary to review the portions of the record and the precedents of this Court that support the conclusion of the Court of Appeals. Nevertheless, today's decision denies respondent the relief to which that court found that he is entitled. Since petitioner did not raise the § 2254 (d) issue in the Court of Appeals, and since § 2254 (d) is plainly inapplicable to the mixed question of law and fact at issue in this case, I can see no justice in this result. I therefore respectfully dissent.

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[4] The Court does not suggest, nor could it, that this case falls within the exception to this general principle enunciated in *Stone* v. *Powell*, 428 U. S. 465 (1976).

CHANDLER ET AL. *v.* FLORIDA

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 79–1260. Argued November 12, 1980—Decided January 26, 1981

The Florida Supreme Court, following a pilot program for televising judicial proceedings in the State, promulgated a revised Canon 3A (7) of the Florida Code of Judicial Conduct. The Canon permits electronic media and still photography coverage of judicial proceedings, subject to the control of the presiding judge and to implementing guidelines placing on trial judges obligations to protect the fundamental right of the accused in a criminal case to a fair trial. Appellants, who were charged with a crime that attracted media attention, were convicted after a jury trial in a Florida trial court over objections that the televising and broadcast of parts of their trial denied them a fair and impartial trial. The Florida District Court of Appeal affirmed, finding no evidence that the presence of a television camera hampered appellants in presenting their case, deprived them of an impartial jury, or impaired the fairness of the trial. The Florida Supreme Court denied review. The Florida courts did not construe *Estes* v. *Texas*, 381 U. S. 532, as laying down a *per se* constitutional rule barring broadcast coverage under all circumstances.

Held: The Constitution does not prohibit a state from experimenting with a program such as is authorized by Florida's Canon 3A (7). Pp. 569–583.

(a) This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, is confined to evaluating it in relation to the Federal Constitution. P. 570.

(b) *Estes* v. *Texas*, *supra*, did not announce a constitutional rule that all photographic, radio, and television coverage of criminal trials is inherently a denial of due process. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964 when *Estes* was decided, and is, even now, in a state of continuing change. Pp. 570–574.

(c) An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, conduct of the broadcasting process or prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The appropriate safeguard against juror prejudice is the defendant's right

to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. Pp. 574–575.

(d) Whatever may be the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process," *Estes* v. *Texas*, *supra*, at 587, at present no one has presented empirical data sufficient to establish that the mere presence of the broadcast media in the courtroom inherently has an adverse effect on that process under all circumstances. Here, appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage—let alone that all broadcast trials would be so tainted. Pp. 575–580.

(e) Nor have appellants shown either that the media's coverage of their trial—printed or broadcast—compromised the jury's ability to judge them fairly or that the broadcast coverage of their particular trial had an adverse impact on the trial participants sufficient to constitute a denial of due process. Pp. 580–582.

(f) Absent a showing of prejudice of constitutional dimensions to these appellants, there is no reason for this Court either to endorse or to invalidate Florida's experiment. P. 582.

376 So. 2d 1157, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the result, *post*, p. 583. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 586. STEVENS, J., took no part in the decision of the case.

Joel Hirschhorn argued the cause and filed briefs for appellants.

Jim Smith, Attorney General of Florida, and *Calvin L. Fox*, Assistant Attorney General, argued the cause and filed a brief for appellee.*

**Whitney North Seymour* filed a brief for the American College of Trial Lawyers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *J. Roger Wollenberg*, *Timothy B. Dyk*, *Floyd Abrams*, *Patricia Pickrel*, and *Ralph E. Goldberg* for CBS Inc.; by *Parker D. Thomson* and *Sanford L. Bohrer* for the Community Television Foundation of South Florida, Inc., et al.; by *Talbot D'Alemberte* and *Donald M. Middlebrooks* for Florida News Inter-

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal is whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused.

I

A

Background. Over the past 50 years, some criminal cases characterized as "sensational" have been subjected to extensive coverage by news media, sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice. Judges, lawyers, and others soon became concerned, and in 1937, after study, the American Bar Association House of Delegates

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ests on Development and Operation of Florida Rule; and by *J. Laurent Scharff, Joel M. Hamme, Jack N. Goodman, Mortimer Becker, Corydon B. Dunham, Erwin G. Krasnow, Carl R. Ramey, Arthur B. Sackler,* and *Ernest T. Sanchez* for the Radio Television News Directors Association et al.

Briefs of *amici curiae* were filed for the Attorney General of Alabama et al. by *Bronson C. La Follette,* Attorney General of Wisconsin, *Kirbie Knutson,* Assistant Attorney General, *Charles A. Graddick,* Attorney General of Alabama, *Wilson L. Condon,* Attorney General of Alaska, *Robert K. Corbin,* Attorney General of Arizona, *Thomas J. Miller,* Attorney General of Iowa, *Steven L. Beshear,* Attorney General of Kentucky, *William J. Guste, Jr.,* Attorney General of Louisiana, *Stephen H. Sachs,* Attorney General of Maryland, *Mike Greely,* Attorney General of Montana, *Richard H. Bryan,* Attorney General of Nevada, *Jeff Bingaman,* Attorney General of New Mexico, *Robert Abrams,* Attorney General of New York, *William J. Brown,* Attorney General of Ohio, *Dennis J. Roberts II,* Attorney General of Rhode Island, *William M. Leech, Jr.,* Attorney General of Tennessee, *M. Jerome Diamond,* Attorney General of Vermont, and *Chauncey H. Browning, Jr.,* Attorney General of West Virginia; for the Conference of Chief Justices by *Griffin B. Bell, James D. Miller,* and *James D. Whisenand;* and for the California State Public Defenders Association et al. by *Herbert M. Barish* and *Wilbur F. Littlefield.*

adopted Judicial Canon 35, declaring that all photographic and broadcast coverage of courtroom proceedings should be prohibited.[1] In 1952, the House of Delegates amended Canon 35 to proscribe television coverage as well. 77 A. B. A. Rep. 610–611 (1952). The Canon's proscription was reaffirmed in 1972 when the Code of Judicial Conduct replaced the Canons of Judicial Ethics and Canon 3A (7) superseded Canon 35. E. Thode, Reporter's Notes to Code of Judicial Conduct 56–59 (1973). Cf. Fed. Rule Crim. Proc. 53. A majority of the states, including Florida, adopted the substance of the ABA provision and its amendments. In Florida, the rule was embodied in Canon 3A (7) of the Florida Code of Judicial Conduct.[2]

In February 1978, the American Bar Association Committee on Fair Trial-Free Press proposed revised standards. These

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[1] 62 A. B. A. Rep. 1134–1135 (1937). As adopted on September 30, 1937, Judicial Canon 35 read:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

[2] As originally adopted in Florida, Canon 3A (7) provided:

"A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

"(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

"(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

"(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions;

"(i) the means of recording will not distract participants or impair the dignity of the proceedings;

"(ii) the parties have consented, and the consent to being depicted or

included a provision permitting courtroom coverage by the electronic media under conditions to be established by local rule and under the control of the trial judge, but only if such coverage was carried out unobtrusively and without affecting the conduct of the trial.[3] The revision was endorsed by the ABA's Standing Committee on Standards for Criminal Justice and by its Committee on Criminal Justice and the Media, but it was rejected by the House of Delegates on February 12, 1979. 65 A. B. A. J. 304 (1979).

In 1978, based upon its own study of the matter, the Conference of State Chief Justices, by a vote of 44 to 1, approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television, and other photographic coverage of court proceedings.[4]

The Florida Program. In January 1975, while these developments were unfolding, the Post-Newsweek Stations of Florida petitioned the Supreme Court of Florida urging a change in Florida's Canon 3A (7). In April 1975, the court invited presentations in the nature of a rulemaking proceeding, and, in January 1976, announced an experimental program for televising one civil and one criminal trial under specific guidelines. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So. 2d 1. These initial guidelines required the consent of all parties. It developed, however, that in practice such consent could not be obtained. The Florida Supreme Court then supplemented its order and established a new 1-year pilot pro-

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recorded has been obtained from each witness appearing in the recording and reproduction;

"(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

"(iv) the reproduction will be exhibited only for instructional purposes in educational institutions."

[3] Proposed Standard 8-3.6 (a) of the ABA Project on Standards for Criminal Justice, Fair Trial and Free Press (Tent. Draft 1978).

[4] Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the Thirtieth Annual Meeting of the Conference of Chief Justices, Burlington, Vt., Aug. 2, 1978.

gram during which the electronic media were permitted to cover all judicial proceedings in Florida without reference to the consent of participants, subject to detailed standards with respect to technology and the conduct of operators. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 347 So. 2d 402 (1977). The experiment began in July 1977 and continued through June 1978.

When the pilot program ended, the Florida Supreme Court received and reviewed briefs, reports, letters of comment, and studies. It conducted its own survey of attorneys, witnesses, jurors, and court personnel through the Office of the State Court Coordinator. A separate survey was taken of judges by the Florida Conference of Circuit Judges. The court also studied the experience of 6 States [5] that had, by 1979, adopted rules relating to electronic coverage of trials, as well as that of the 10 other States that, like Florida, were experimenting with such coverage.[6]

Following its review of this material, the Florida Supreme Court concluded "that on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage." *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 780 (1979). The Florida court was of the view that because of the significant effect of the courts on the day-to-day lives of the citizenry, it was essential that the people have confidence in the process. It felt that broadcast cover-

[5] Alabama, Colorado, Georgia, New Hampshire, Texas, and Washington.

[6] The number of states permitting electronic coverage of judicial proceedings has grown larger since 1979. As of October 1980, 19 States permitted coverage of trial and appellate courts, 3 permitted coverage of trial courts only, 6 permitted appellate court coverage only, and the court systems of 12 other States were studying the issue. Brief for the Radio Television News Directors Association et al. as *Amici Curiae*. On November 10, 1980, the Maryland Court of Appeals authorized an 18-month experiment with broadcast coverage of both trial and appellate court proceedings. 49 U. S. L. W. 2335 (1980).

age of trials would contribute to wider public acceptance and understanding of decisions. *Ibid.* Consequently, after revising the 1977 guidelines to reflect its evaluation of the pilot program, the Florida Supreme Court promulgated a revised Canon 3A (7). *Id.*, at 781. The Canon provides:

> "Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida." *Ibid.*

The implementing guidelines specify in detail the kind of electronic equipment to be used and the manner of its use. *Id.*, at 778–779, 783–784. For example, no more than one television camera and only one camera technician are allowed. Existing recording systems used by court reporters are used by broadcasters for audio pickup. Where more than one broadcast news organization seeks to cover a trial, the media must pool coverage. No artificial lighting is allowed. The equipment is positioned in a fixed location, and it may not be moved during trial. Videotaping equipment must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed. The judge has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial. The Florida Supreme Court has the right to revise these rules as experience dictates, or indeed to bar all broadcast coverage or photography in courtrooms.

B

In July 1977, appellants were charged with conspiracy to commit burglary, grand larceny, and possession of burglary tools. The counts covered breaking and entering a well-known Miami Beach restaurant.

The details of the alleged criminal conduct are not relevant to the issue before us, but several aspects of the case distinguish it from a routine burglary. At the time of their arrest, appellants were Miami Beach policemen. The State's principal witness was John Sion, an amateur radio operator who, by sheer chance, had overheard and recorded conversations between the appellants over their police walkie-talkie radios during the burglary. Not surprisingly, these novel factors attracted the attention of the media.

By pretrial motion, counsel for the appellants sought to have experimental Canon 3A (7) declared unconstitutional on its face and as applied. The trial court denied relief but certified the issue to the Florida Supreme Court. However, the Supreme Court declined to rule on the question, on the ground that it was not directly relevant to the criminal charges against the appellants. *State* v. *Granger*, 352 So. 2d 175 (1977).

After several additional fruitless attempts by the appellants to prevent electronic coverage of the trial, the jury was selected. At *voir dire*, the appellants' counsel asked each prospective juror whether he or she would be able to be "fair and impartial" despite the presence of a television camera during some, or all, of the trial. Each juror selected responded that such coverage would not affect his or her consideration in any way. A television camera recorded the *voir dire*.

A defense motion to sequester the jury because of the television coverage was denied by the trial judge. However, the court instructed the jury not to watch or read anything about the case in the media and suggested that jurors "avoid the local news and watch only the national news on televi-

sion." App. 13. Subsequently, defense counsel requested that the witnesses be instructed not to watch any television accounts of testimony presented at trial. The trial court declined to give such an instruction, for "no witness' testimony was [being] reported or televised [on the evening news] in any way." *Id.*, at 14.

A television camera was in place for one entire afternoon, during which the State presented the testimony of Sion, its chief witness.[7] No camera was present for the presentation of any part of the case for the defense. The camera returned to cover closing arguments. Only 2 minutes and 55 seconds of the trial below were broadcast—and those depicted only the prosecution's side of the case.

The jury returned a guilty verdict on all counts. Appellants moved for a new trial, claiming that because of the television coverage, they had been denied a fair and impartial trial. No evidence of specific prejudice was tendered.

The Florida District Court of Appeal affirmed the convictions. It declined to discuss the facial validity of Canon 3A (7); it reasoned that the Florida Supreme Court, having decided to permit television coverage of criminal trials on an experimental basis, had implicitly determined that such coverage did not violate the Federal or State Constitutions. Nonetheless, the District Court of Appeal did agree to certify the question of the facial constitutionality of Canon 3A (7) to the Florida Supreme Court. The District Court of Appeal found no evidence in the trial record to indicate that the presence of a television camera had hampered appellants in presenting their case or had deprived them of an impartial jury.

The Florida Supreme Court denied review, holding that the appeal, which was limited to a challenge to Canon 3A (7),

[7] At one point during Sion's testimony, the judge interrupted the examination and admonished a cameraman to discontinue a movement that the judge apparently found distracting. App. 15. Otherwise, the prescribed procedures appear to have been followed, and no other untoward events occurred.

was moot by reason of its decision in *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (1979), rendered shortly after the decision of the District Court of Appeal.

II

At the outset, it is important to note that in promulgating the revised Canon 3A (7), the Florida Supreme Court pointedly rejected any state or federal constitutional right of access on the part of photographers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings. It carefully framed its holding as follows:

> "While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings." *Id.*, at 774.

The Florida court relied on our holding in *Nixon* v. *Warner Communications, Inc.*, 435 U. S. 589 (1978), where we said:

> "In the first place, . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is 'a safeguard against any attempt to employ our courts as instruments of persecution,' it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Id.*, at 610 (citations omitted).

The Florida Supreme Court predicated the revised Canon 3A (7) upon its supervisory authority over the Florida courts,

and not upon any constitutional imperative. Hence, we have before us only the limited question of the Florida Supreme Court's authority to promulgate the Canon for the trial of cases in Florida courts.

This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution.

III

Appellants rely chiefly on *Estes* v. *Texas*, 381 U. S. 532 (1965), and Chief Justice Warren's separate concurring opinion in that case. They argue that the televising of criminal trials is inherently a denial of due process, and they read *Estes* as announcing a *per se* constitutional rule to that effect.

Chief Justice Warren's concurring opinion, in which he was joined by Justices Douglas and Goldberg, indeed provides some support for the appellants' position:

> "While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom." *Id.*, at 552.

If appellants' reading of *Estes* were correct, we would be obliged to apply that holding and reverse the judgment under review.

The six separate opinions in *Estes* must be examined carefully to evaluate the claim that it represents a *per se* constitutional rule forbidding all electronic coverage. Chief Justice Warren and Justices Douglas and Goldberg joined Justice Clark's opinion announcing the judgment, thereby creating

only a plurality. Justice Harlan provided the fifth vote necessary in support of the judgment. In a separate opinion, he pointedly limited his concurrence:

> "I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion." *Id.*, at 587.

A careful analysis of Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding of *Estes*.

Justice Harlan began by observing that the question of the constitutional permissibility of televised trials was one fraught with unusual difficulty:

> "Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, *and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial* assured by the Due Process Clause of the Fourteenth Amendment." *Ibid.* (emphasis added).

He then proceeded to catalog what he perceived as the inherent dangers of televised trials.

> "In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be

> appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense attorney, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?" *Id.*, at 591.

Justice Harlan faced squarely the reality that these possibilities carry "grave potentialities for distorting the integrity of the judicial process," and that, although such distortions may produce no telltale signs, "their effects may be far more pervasive and deleterious than the physical disruptions which all would concede would vitiate a conviction." *Id.*, at 592. The "countervailing factors" alluded to by Justice Harlan were, as here, the educational and informational value to the public.

JUSTICE STEWART, joined by JUSTICES Black, BRENNAN, and WHITE in dissent, concluded that no prejudice had been shown and that Estes' Fourteenth Amendment rights had not been violated. While expressing reservations not unlike those of Justice Harlan and those of Chief Justice Warren, the dissent expressed unwillingness to "escalate this personal view into a *per se* constitutional rule." *Id.*, at 601. The four dissenters disagreed both with the *per se* rule embodied in the plurality opinion of Justice Clark and with the judgment of the Court that "the *circumstances of* [*that*] trial led to a denial of [Estes'] Fourteenth Amendment rights." *Ibid.* (emphasis added).

Parsing the six opinions in *Estes*, one is left with a sense of doubt as to precisely how much of Justice Clark's opinion was joined in, and supported by, Justice Harlan. In an area

charged with constitutional nuances, perhaps more should not be expected. Nonetheless, it is fair to say that Justice Harlan viewed the holding as limited to the proposition that *"what was done in this case* infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment," *id.*, 587 (emphasis added), he went on:

> *"At the present juncture* I can only conclude that televised trials, *at least in cases like this one,* possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." *Id.*, at 596 (emphasis added).

Justice Harlan's opinion, upon which analysis of the constitutional holding of *Estes* turns, must be read as defining the scope of that holding; we conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances.[8] It does not stand as an absolute ban on

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[8] Our subsequent cases have so read *Estes*. In *Sheppard* v. *Maxwell*, 384 U. S. 333, 352 (1966), the Court noted *Estes* as an instance where the "totality of circumstances" led to a denial of due process. In *Murphy* v. *Florida*, 421 U. S. 794, 798 (1975), we described it as "a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." And, in *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 552 (1976), we depicted *Estes* as a trial lacking in due process where "the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself" prevented a sober search for the truth.

In his opinion concurring in the result in the instant case, JUSTICE STEWART restates his dissenting view in *Estes* that the *Estes* Court announced a *per se* rule banning all broadcast coverage of trials as a denial of due process. This view overlooks the critical importance of Justice Harlan's opinion in relation to the ultimate holding of *Estes*. It is true that Justice Harlan's opinion "sounded a note" that is central to the proposition that broadcast coverage inherently violates the Due Process Clause. *Post*, at 585. But the presence of that "note" in no sense alters Justice Harlan's explicit reservations in his concurrence. Not all of the dissenting Justices in *Estes* read the Court as announcing a *per se*

state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.

IV

Since we are satisfied that *Estes* did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process, we turn to consideration, as a matter of first impression, of the appellants' suggestion that we now promulgate such a *per se* rule.

A

Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law. Over the years, courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations. See, *e. g., Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 563–565 (1976).

An absolute constitutional ban on broadcast coverage of

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rule; JUSTICE BRENNAN, for example, was explicit in emphasizing "that only four of the five Justices [in the majority] rest[ed] on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances." 381 U. S., at 617. Today, JUSTICE STEWART concedes, *post*, at 585–586, and n. 3, that Justice Harlan purported to limit his conclusion to a subclass of cases. And, as he concluded his opinion, Justice Harlan took pains to emphasize his view that "*the day may come* when television will have become so commonplace an affair in the daily life of the average person as to dissipate *all* reasonable likelihood that its use in courtrooms *may* disparage the judicial process." 381 U. S., at 595 (emphasis added). That statement makes clear that there was not a Court holding of a *per se* rule in *Estes*. As noted in text, Justice Harlan pointedly limited his conclusion to cases like the one then before the Court, those "utterly corrupted" by press coverage. There is no need to "overrule" a "holding" never made by the Court.

trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. See Part IV–D, *infra*.

B

As we noted earlier, the concurring opinions in *Estes* expressed concern that the very presence of media cameras and recording devices at a trial inescapably gives rise to an adverse psychological impact on the participants in the trial. This kind of general psychological prejudice, allegedly present whenever there is broadcast coverage of a trial, is different from the more particularized problem of prejudicial impact discussed earlier. If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required.

In confronting the difficult and sensitive question of the potential psychological prejudice associated with broadcast coverage of trials, we have been aided by *amici* briefs submitted by various state officers involved in law enforcement, the Conference of Chief Justices, and the Attorneys General

of 17 States[9] in support of continuing experimentation such as that embarked upon by Florida, and by the American College of Trial Lawyers, and various members of the defense bar[10] representing essentially the views expressed by the concurring Justices in *Estes*.

Not unimportant to the position asserted by Florida and other states is the change in television technology since 1962, when Estes was tried. It is urged, and some empirical data are presented,[11] that many of the negative factors found in *Estes*—cumbersome equipment, cables, distracting lighting, numerous camera technicians—are less substantial factors today than they were at that time.

It is also significant that safeguards have been built into the

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[9] Brief for the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as *Amici Curiae*.

[10] Brief for the California State Public Defenders Association, the California Attorneys for Criminal Justice, the Office of the California State Public Defender, the Los Angeles County Public Defenders Association, the Los Angeles Criminal Courts Bar Association, and the Office of the Los Angeles County Public Defender as *Amici Curiae*.

[11] Considerable attention is devoted by the parties to experiments and surveys dealing with the impact of electronic coverage on the participants in a trial other than the defendant himself. The Florida pilot program itself was a type of study, and its results were collected in a postprogram survey of participants. While the data thus far assembled are cause for some optimism about the ability of states to minimize the problems that potentially inhere in electronic coverage of trials, even the Florida Supreme Court conceded the data were "limited," *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 781 (1979), and "non-scientific," *id.*, at 768. Still, it is noteworthy that the data now available do not support the proposition that, in every case and in all circumstances, electronic coverage creates a significant adverse effect upon the participants in trials—at least not one uniquely associated with electronic coverage as opposed to more traditional forms of coverage. Further research may change the picture. At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.

experimental programs in state courts, and into the Florida program, to avoid some of the most egregious problems envisioned by the six opinions in the *Estes* case. Florida admonishes its courts to take special pains to protect certain witnesses—for example, children, victims of sex crimes, some informants, and even the very timid witness or party—from the glare of publicity and the tensions of being "on camera." *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d, at 779.

The Florida guidelines place on trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial. The Florida Canon, being one of the few permitting broadcast coverage of criminal trials over the objection of the accused, raises problems not present in the rules of other states. Inherent in electronic coverage of a trial is the risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected. Given this danger, it is significant that Florida requires that objections of the accused to coverage be heard and considered on the record by the trial court. See, *e. g.*, *Green* v. *State*, 377 So. 2d 193, 201 (Fla. App. 1979). In addition to providing a record for appellate review, a pretrial hearing enables a defendant to advance the basis of his objection to broadcast coverage and allows the trial court to define the steps necessary to minimize or eliminate the risks of prejudice to the accused. Experiments such as the one presented here may well increase the number of appeals by adding a new basis for claims to reverse, but this is a risk Florida has chosen to take after preliminary experimentation. Here, the record does not indicate that appellants requested an evidentiary hearing to show adverse impact or injury. Nor does the record reveal anything more than generalized allegations of prejudice.

Nonetheless, it is clear that the general issue of the psychological impact of broadcast coverage upon the participants in a trial, and particularly upon the defendant, is still a subject of sharp debate—as the *amici* briefs of the American College of Trial Lawyers and others of the trial bar in opposition to Florida's experiment demonstrate. These *amici* state the view that the concerns expressed by the concurring opinions in *Estes,* see Part III, *supra,* have been borne out by actual experience. Comprehensive empirical data are still not available—at least on some aspects of the problem. For example, the *amici* brief of the Attorneys General concedes:

> "The defendant's interests in not being harassed and in being able to concentrate on the proceedings and confer effectively with his attorney are crucial aspects of a fair trial. There is not much data on defendant's reactions to televised trials available now, but what there is indicates that it is possible to regulate the media so that their presence does not weigh heavily on the defendant. *Particular attention should be paid to this area of concern as study of televised trials continues.*" Brief for the Attorney General of Alabama et al. as *Amici Curiae* 40 (emphasis added).

The experimental status of electronic coverage of trials is also emphasized by the *amicus* brief of the Conference of Chief Justices:

> "Examination and reexamination, by state courts, of the in-court presence of the electronic news media, *vel non,* is an exercise of authority reserved to the states under our federalism." Brief for Conference of Chief Justices as *Amicus Curiae* 2.

Whatever may be the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process," *Estes* v. *Texas,* 381 U. S., at 587, at present no one has been able to present empirical data sufficient to establish that the mere

presence of the broadcast media inherently has an adverse effect on that process. See n. 11, *supra*. The appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage—let alone that all broadcast trials would be so tainted. See Part IV–D, *infra*.[12]

Where, as here, we cannot say that a denial of due process automatically results from activity authorized by a state, the admonition of Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932), is relevant:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." (Footnote omitted.)

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[12] Other courts that have been asked to examine the impact of television coverage on the participants in particular trials have concluded that such coverage did not have an adverse impact on the trial participants sufficient to constitute a denial of due process. See, *e. g.*, *Bradley* v. *Texas*, 470 F. 2d 785 (CA5 1972); *Bell* v. *Patterson*, 279 F. Supp. 760 (Colo.), aff'd, 402 F. 2d 394 (CA10 1968), cert. denied, 403 U. S. 955 (1971); *Gonzales* v. *People*, 165 Colo. 322, 438 P. 2d 686 (1968). On the other hand, even the *amici* supporting Florida's position concede that further experimentation is necessary to evaluate the potential psychological prejudice associated with broadcast coverage of trials. Further developments and more data are required before this issue can be finally resolved.

This concept of federalism, echoed by the states favoring Florida's experiment, must guide our decision.

C

Amici members of the defense bar, see n. 10, *supra*, vigorously contend that displaying the accused on television is in itself a denial of due process. Brief for the California State Public Defenders Association et al. as *Amici Curiae* 5–10. This was a source of concern to Chief Justice Warren and Justice Harlan in *Estes:* that coverage of select cases "singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others." 381 U. S., at 565 (Warren, C. J., concurring). Selection of which trials, or parts of trials, to broadcast will inevitably be made not by judges but by the media, and will be governed by such factors as the nature of the crime and the status and position of the accused—or of the victim; the effect may be to titillate rather than to educate and inform. The unanswered question is whether electronic coverage will bring public humiliation upon the accused with such randomness that it will evoke due process concerns by being "unusual in the same way that being struck by lighting" is "unusual." *Furman* v. *Georgia*, 408 U. S. 238, 309 (1972) (STEWART, J., concurring). Societies and political systems, that, from time to time, have put on "Yankee Stadium" "show trials" tell more about the power of the state than about its concern for the decent administration of justice—with every citizen receiving the same kind of justice.

The concurring opinion of Chief Justice Warren joined by Justices Douglas and Goldberg in *Estes* can fairly be read as viewing the very broadcast of some trials as potentially a form of punishment in itself—a punishment before guilt. This concern is far from trivial. But, whether coverage of a few trials will, in practice, be the equivalent of a "Yankee Stadium" setting—which Justice Harlan likened to the public

pillory long abandoned as a barbaric perversion of decent justice—must also await the continuing experimentation.

D

To say that the appellants have not demonstrated that broadcast coverage is inherently a denial of due process is not to say that the appellants were in fact accorded all of the protections of due process in their trial. As noted earlier, a defendant has the right on review to show that the media's coverage of his case—printed or broadcast—compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process. Neither showing was made in this case.

To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters. *Murphy* v. *Florida*, 421 U. S. 794, 800 (1975). No doubt the very presence of a camera in the courtroom made the jurors aware that the trial was thought to be of sufficient interest to the public to warrant coverage. Jurors, forbidden to watch all broadcasts, would have had no way of knowing that only fleeting seconds of the proceeding would be reproduced. But the appellants have not attempted to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast.

Although not essential to our holding, we note that at *voir dire*, the jurors were asked if the presence of the camera would in any way compromise their ability to consider the case. Each answered that the camera would not prevent him or her from considering the case solely on the merits. App.

8–12. The trial court instructed the jurors not to watch television accounts of the trial, *id.*, at 13–14, and the appellants do not contend that any juror violated this instruction. The appellants have offered no evidence that any participant in this case was affected by the presence of cameras. In short, there is no showing that the trial was compromised by television coverage, as was the case in *Estes*.

V

It is not necessary either to ignore or to discount the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts. Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene. We must assume state courts will be alert to any factors that impair the fundamental rights of the accused.

The Florida program is inherently evolutional in nature; the initial project has provided guidance for the new canons which can be changed at will, and application of which is subject to control by the trial judge. The risk of prejudice to particular defendants is ever present and must be examined carefully as cases arise. Nothing of the "Roman circus" or "Yankee Stadium" atmosphere, as in *Estes*, prevailed here, however, nor have appellants attempted to show that the unsequestered jury was exposed to "sensational" coverage, in the sense of *Estes* or of *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966). Absent a showing of prejudice of constitutional dimensions to these defendants, there is no reason for this Court either to endorse or to invalidate Florida's experiment.

In this setting, because this Court has no supervisory authority over state courts, our review is confined to whether

there is a constitutional violation. We hold that the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A (7).

Affirmed.

JUSTICE STEVENS took no part in the decision of this case.

JUSTICE STEWART, concurring in the result.

Although concurring in the judgment, I cannot join the opinion of the Court because I do not think the convictions in this case can be affirmed without overruling *Estes* v. *Texas*, 381 U. S. 532.

I believe now, as I believed in dissent then, that *Estes* announced a *per se* rule that the Fourteenth Amendment "prohibits all television cameras from a state courtroom whenever a criminal trial is in progress." *Id.*, at 614; see also *id.*, at 615 (WHITE, J., dissenting). Accordingly, rather than join what seems to me a wholly unsuccessful effort to distinguish that decision, I would now flatly overrule it.

While much was made in the various opinions in *Estes* of the technological improvements that might some day render television coverage of criminal trials less obtrusive, the restrictions on television in the *Estes* trial were not significantly different from those in the trial of these appellants. The opinion of the Court in *Estes* set out the limitations placed on cameras during that trial:

> "A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.
>
> "[L]ive telecasting was prohibited during a great portion of the actual trial. Only the opening and closing arguments of the State, the return of the jury's verdict

and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury." *Id.*, at 537 (footnote omitted).

In his concurring opinion, Justice Harlan also remarked upon the physical setting:

> "Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, 'commercials' at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by any acceptable standard. *But that is not the case before us. We must judge television as we find it in this trial—relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.*" *Id.*, at 588 (emphasis added).

The constitutional violation perceived by the *Estes* Court did not, therefore, stem from physical disruption that might one day disappear with technological advances in television equipment. The violation inhered, rather, in the hypothesis that the mere presence of cameras and recording devices might have an effect on the trial participants prejudicial to the accused.[1] See *id.*, at 542–550 (opinion of the Court).

[1] Certain aspects of the *Estes* trial made that case an even easier one than this one in which to find no substantial threat to a fair trial. For example, the jurors in *Estes* were sequestered day and night, from the first day of the trial until it ended. The jurors in the present case were

And Justice Harlan sounded a note in his concurring opinion that is the central theme of the appellants here: "Courtroom television introduces into the conduct of a criminal trial the element of professional 'showmanship,' an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena." *Id.*, at 591.

It can accurately be asserted that television technology has advanced in the past 15 years, and that Americans are now much more familiar with that medium of communication. It does not follow, however, that the "subtle capacities for serious mischief" are today diminished, or that the "imponderables of the trial arena" are now less elusive.

The Court necessarily [2] relies on the concurring opinion of Justice Harlan in its attempt to distinguish this case from *Estes*. It begins by noting that Justice Harlan limited his opinion *"to a notorious criminal trial such as [the one in Estes] . . . ."* *Ante*, at 571 (emphasis of the Court). But the Court disregards Justice Harlan's concession that such a limitation may not be meaningful.[3] Justice Harlan admitted

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not sequestered at all. Aside from a court-monitored opportunity for the jurors to watch election returns, the *Estes* jurors were not permitted to watch television at any time during the trial. In contrast, the jurors in the present case were left free to watch the evening news programs—and to look for a glimpse of themselves while watching replays of the prosecution's most critical evidence.

[2] The Court today concedes that Justice Clark's opinion for the Court in *Estes* announced a *per se* rule; that the concurring opinion of Chief Justice Warren, joined by Justices Douglas and Goldberg, pointed to "the inherent prejudice of televised criminal trials"; and that the dissenting Justices objected to the announcement of a *per se* rule, *ante*, at 570, 572.

[3] The Court also seems to disregard its own description of the trial of the appellants, a description that suggests that the trial was a "notorious" one, at least in the local community. The Court's description notes that "several aspects of the case distinguish it from a routine burglary . . . [and] [n]ot surprisingly, these novel factors attracted the attention of the

that "it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice [in a 'run-of-the-mill' case], though less severe, are nonetheless of constitutional proportions." 381 U. S., at 590. Finally, Justice Harlan stated unambiguously that he was "by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved." *Ibid.*[4]

The Court in *Estes* found the admittedly unobtrusive presence of television cameras in a criminal trial to be inherently prejudicial, and thus violative of due process of law. Today the Court reaches precisely the opposite conclusion. I have no great trouble in agreeing with the Court today, but I would acknowledge our square departure from precedent.

JUSTICE WHITE, concurring in the judgment.

The Florida rule, which permits the televising of criminal trials under controlled conditions, is challenged here on its face and as applied. Appellants contend that the rule is facially invalid because the televising of *any* criminal trial over the objection of the defendant inherently results in a constitutionally unfair trial; they contend that the rule is unconstitutional as applied to them because their case attracted substantial publicity and, therefore, falls within the rule established in *Estes* v. *Texas*, 381 U. S. 532 (1965).* The Florida court rejected both of these claims.

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media." *Ante*, at 567. Indeed, the Court's account confirms the wisdom of Justice Harlan's concession that a *per se* rule limited only to cases with high public interest may not be workable.

[4] The fact is, of course, that a run-of-the-mill trial—of a civil suit to quiet title, or upon a "routine burglary" charge for example—would hardly attract the cameras of public television. By the same token, the very televising of a trial serves to make that trial a "notorious" or "heavily publicized" one.

*In their motion in the Florida Circuit Court to declare Florida's rule unconstitutional, appellants claimed that their case had "received a sub-

For the reasons stated by JUSTICE STEWART in his concurrence today, I think *Estes* is fairly read as establishing a *per se* constitutional rule against televising any criminal trial if the defendant objects. So understood, *Estes* must be overruled to affirm the judgment below.

It is arguable, however, that *Estes* should be read more narrowly, in light of Justice Harlan's concurring opinion, as forbidding the televising of only widely publicized and sensational criminal trials. Justice Harlan, the fifth vote in *Estes*, characterized *Estes* as such a case and concurred in the opinion of the Court only to the extent that it applied to a "criminal trial of great notoriety." *Id.*, at 587. He recognized that there had been no showing of specific prejudice to the defense, *id.*, at 591, but argued that no such showing was required "in cases like this one."

Whether the decision in *Estes* is read broadly or narrowly, I agree with JUSTICE STEWART that it should be overruled. I was in dissent in that case, and I remain unwilling to assume or conclude without more proof than has been marshaled to date that televising criminal trials is inherently prejudicial even when carried out under properly controlled conditions. A defendant should, of course, have ample opportunity to convince a judge that televising his trial would be unfair to him, and the judge should have the authority to exclude cameras from all or part of the criminal trial. But absent some showing of prejudice to the defense, I remain convinced that a conviction obtained in a state court should not be overturned simply because a trial judge refused to exclude television cameras and all or part of the trial was

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stantial amount of publicity" and then argued that "[a]s . . . in *Estes* v. *Texas*, 381 U. S. 532 (1965), the presence of television cameras . . . will substantially harm and impair the Defendant's right to a fair and impartial trial . . . ." App. 4. In their brief on the merits, appellants described their case as "not 'notorious' [but] at least 'more than routine' " and asked the Court to extend the *Estes* rule to it. Brief for Appellants 10.

televised to the public. The experience of those States which have, since *Estes*, permitted televised trials supports this position, and I believe that the accumulated experience of those States has further undermined the assumptions on which the majority rested its judgment in *Estes*.

Although the Court's opinion today contends that it is consistent with *Estes*, I believe that it effectively eviscerates *Estes*. The Florida rule has no exception for the sensational or widely publicized case. Absent a showing of specific prejudice, *any* kind of case may be televised as long as the rule is otherwise complied with. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 774 (Fla. 1979). Thus, even if the present case is precisely the kind of case referred to in Justice Harlan's concurrence in *Estes*, the Florida rule overrides the defendant's objections. The majority opinion does not find it necessary to deal with appellants' contention that because their case attracted substantial publicity, specific prejudice need not be shown. By affirming the judgment below, which sustained the rule, the majority indicates that not even the narrower reading of *Estes* will any longer be authoritative.

Moreover, the Court now reads *Estes* as merely announcing that on the facts of that case there had been an unfair trial—*i. e.*, it established no *per se* rule at all. Justice Clark's plurality opinion, however, expressly recognized that no "isolatable" or "actual" prejudice had been or need be shown, 381 U. S., at 542–543, and Justice Harlan expressly rejected the necessity of showing "specific" prejudice in cases "like this one." *Id.*, at 593. It is thus with telling effect that the Court now rules that "[a]bsent a showing of prejudice of constitutional dimensions to these defendants," there is no reason to overturn the Florida rule, to reverse the judgment of the Florida Supreme Court, or to set aside the conviction of the appellants. *Ante*, at 582.

By reducing *Estes* to an admonition to proceed with some caution, the majority does not underestimate or minimize the

risks of televising criminal trials over a defendant's objections. I agree that those risks are real and should not be permitted to develop into the reality of an unfair trial. Nor does the decision today, as I understand it, suggest that any State is any less free than it was to avoid this hazard by not permitting a trial to be televised over the objection of the defendant or by forbidding cameras in its courtrooms in any criminal case.

Accordingly, I concur in the judgment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ASSOCIATED DRY GOODS CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1068. Argued November 3, 1980—Decided January 26, 1981

Section 706 (b) of Title VII of the Civil Rights Act of 1964 provides that employment discrimination charges "shall not be made public" by the Equal Employment Opportunity Commission (EEOC) and bars public disclosure of anything "said or done" during informal Commission settlement endeavors. Section 709 (e) makes it a misdemeanor for any EEOC officer or employee "to make public" any information the EEOC obtains through its investigative powers before the institution of any proceeding involving such information. After employment discrimination charges were filed against a department store division (Horne) of respondent, the EEOC requested Horne to provide it with the complainants' employment records and other information relating to Horne's personnel practices. Horne refused to provide the information unless the EEOC agreed not to disclose it to the charging parties. The EEOC refused to give this assurance, explaining its practice, pursuant to regulations and its Compliance Manual, of making limited disclosure to a charging party of information in his and other files when he needs that information in connection with a potential lawsuit. When Horne continued to refuse to provide the requested information, the EEOC subpoenaed the material. Respondent then filed suit in Federal District Court, seeking to have the EEOC's limited disclosure practices declared in violation of Title VII and to enjoin enforcement of the subpoena. The District Court held that such practices violated Title VII, and accordingly enforced the subpoena only on the condition that the EEOC treat charging parties as members of the "public" to whom it cannot disclose any information in its files. The Court of Appeals affirmed.

Held: Congress did not include charging parties within the "public" to whom disclosure of confidential information is illegal under §§ 706 (b) and 709 (e). Pp. 598-604.

(a) The "public" to whom §§ 706 (b) and 709 (e) forbid disclosure of charges and other information cannot logically include the parties to the agency proceeding, since the charges, of course, cannot be concealed from the charging party or from the respondent upon whom the statute requires notice to be served. A consistent reading of the statute requires that the "public" to whom § 709 (e) prohibits dis-

closure of information obtained in Commission investigations similarly exclude the parties. P. 598.

(b) The legislative history of §§ 706 (b) and 709 (e) supports this reading of the statute. Pp. 598–600.

(c) Moreover, such reading of the statute is consistent with the coordinated scheme of administrative and judicial enforcement of Title VII. Limited disclosure to the parties can speed the EEOC's required investigation and enhances its ability to carry out its statutory responsibility to resolve charges through informal conciliation and negotiation. Pp. 600–602.

(d) Even if disclosure to charging parties may encourage litigation in some instances, this result is not inconsistent with Title VII's ultimate purposes of permitting a private right of action as an important part of the enforcement scheme. Pp. 602–603.

(e) It was error to hold that respondent had a categorical right to refuse to comply with the EEOC subpoena unless the EEOC assured it that the information supplied would be held in absolute secrecy. Respondent was only entitled to assurance that each employee filing a charge against Horne would see information in no file other than his or her own. Pp. 603–604.

607 F. 2d 1075, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 604. STEVENS, J., filed a dissenting opinion, *post*, p. 606. POWELL, J., took no part in the decision of the case. REHNQUIST, J., took no part in the consideration or decision of the case.

Barry Sullivan argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Wallace, Leroy D. Clark, Joseph T. Eddins, Lutz Alexander Prager,* and *Vella M. Fink.*

Roger S. Kaplan argued the cause for respondent. With him on the brief were *Robert Lewis, Joel L. Finger,* and *Thomas C. Greble.**

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*Briefs of *amici curiae* urging affirmance were filed by *Leonard Rovins* and *Alan D. Gallay* for the American Retail Federation; and by *Robert E. Williams* and *Douglas S. McDowell* for the Equal Employment Advisory Council.

JUSTICE STEWART delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 limits the authority of the Equal Employment Opportunity Commission to make public disclosure of information it has obtained in investigating and attempting to resolve a claim of employment discrimination.[1] We granted certiorari in this case to consider whether the Court of Appeals for the Fourth Circuit was correct in holding that a prelitigation disclosure of information in a Commission file to the employee who filed the Title VII claim is a "public" disclosure within the meaning of the statutory restrictions. 445 U. S. 926.[2]

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[1] Section 706 (b) of Title VII, 78 Stat. 259, as amended, 42 U. S. C. § 2000e–5 (b), provides in relevant part:

"Charges shall be made in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. . . ."

Section 709 (e) of Title VII, 78 Stat. 264, 42 U. S. C. § 2000e–8 (e), provides:

"It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year."

[2] The decision of the Court of Appeals in this case that the Commission lacks the authority to make such a disclosure, *EEOC* v. *Joseph Horne Co.*, 607 F. 2d 1075 (CA4), conflicts with that of the Court of Appeals for the Fifth Circuit in *H. Kessler & Co.* v. *EEOC*, 472 F. 2d 1147. The

I

This case arose when the Commission sought evidence with respect to discrimination charges filed against the Joseph Horne Co., a division of the respondent, Associated Dry Goods Corp. Horne operates retail department stores in Pennsylvania. Between 1971 and 1973, seven Horne employees filed employment discrimination charges with the Commission, six alleging sex discrimination and one alleging racial discrimination. The Commission began its investigation by requesting Horne to provide the employment records of the complainants, and statistics, documents, and other information relating to Horne's general personnel practices. Horne refused to provide the information unless the Commission agreed beforehand not to disclose any of the requested material to the charging parties. The Commission refused to give this assurance, explaining its practice of making limited disclosure to a charging party of information in his and other files when he needs that information in connection with a potential lawsuit.[3] When Horne continued to refuse

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Courts of Appeals for the Seventh and District of Columbia Circuits have construed the "public" disclosure provisions of the statute in virtually the same way as did the Court of Appeals for the Fourth Circuit in the present case, though in the somewhat different context of the Commission's disclosure to individual charging parties of materials emerging from a systemwide investigation of an employer's practices after the Commission itself has brought a charge. *Burlington Northern, Inc.* v. *EEOC*, 582 F. 2d 1097 (CA7); *Sears, Roebuck & Co.* v. *EEOC*, 189 U. S. App. D. C. 163, 581 F. 2d 941. Since the Commission itself brought no charge in this case, the question of how the disclosure provisions apply in that context is not before the Court.

[3] The Commission's general policy on disclosure is set out in 29 CFR § 1601.22 (1979):

"Neither a charge, nor information obtained pursuant to section 709 (a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709 (c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving

to provide the information without an assurance of absolute secrecy, the Commission subpoenaed the material. After the Commission rejected Horne's petition for revocation of the agency subpoena, the respondent filed this suit, asking the District Court to declare that the Commission's limited disclosure practices violated Title VII, and to enjoin the Commission from enforcing the subpoena.[4]

The District Court, concluding that the Commission's disclosure of confidential information to charging parties upsets Title VII's scheme of negotiation and settlement, held that the regulations and the provisions in the Compliance Manual covering special disclosure to charging parties violate Title VII. Accordingly, the court enforced the subpoena only on the condition that the Commission treat charging parties as members of the "public" to whom it cannot disclose any information in its files. 454 F. Supp. 387 (ED Va.). The

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such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information."

The Commission also has created very specific "special disclosure" rules governing the form and scope of disclosure to those persons whom the Commission treats as being separate from the "public" to whom the statute forbids any disclosure. 29 CFR § 1610.17 (d) (1979); EEOC Compliance Manual § 83 *et seq.*

[4] The complaint also alleged that the EEOC disclosure rules violate the Administrative Procedure Act, 5 U. S. C. §§ 551, 553, the Trade Secrets Act, 18 U. S. C. § 1905, and the Freedom of Information Act, 5 U. S. C. § 552. In addition, it alleged that the rules were substantive, rather than procedural, and therefore exceeded the Commission's statutory authority to issue rules of the latter type only. See 42 U. S. C. § 2000e–12. Neither the District Court nor the Court of Appeals addressed any of these allegations, and the issues they raise are not now before us.

Court of Appeals affirmed the District Court's judgment. *EEOC* v. *Joseph Horne Co.*, 607 F. 2d 1075.

II

In enacting Title VII, Congress combined administrative and judicial means of eliminating employment discrimination. A person claiming to be the victim of discrimination must first file a charge with the Commission. The Commission must then serve notice of the charge on the employer, and begin an investigation to determine whether there is reasonable cause to believe the charge is true. 42 U. S. C. § 2000e–5 (b). If it finds no such reasonable cause, the Commission must dismiss the charge. *Ibid.* If it does find reasonable cause, it must try to eliminate the alleged discriminatory practice "by informal methods of conference, conciliation, and persuasion." *Ibid.*[5] If its attempts at conciliation fail, the Commission may bring a civil action against the employer. § 2000e–5 (f)(1). But Title VII also makes private lawsuits by aggrieved employees an important part of its means of enforcement. If the Commission dismisses the charge, the employee may immediately file a private action. *Ibid.* And regardless of whether the Commission finds reasonable cause, the employee may bring an action 180 days after filing the charge if by that time the Commission has not filed its own lawsuit. *Ibid.*[6]

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[5] In most cases, the Commission actually begins its attempt to achieve a negotiated settlement before it makes a reasonable-cause determination. 29 CFR § 1601.20 (1979); EEOC Compliance Manual § 15. If it does achieve an early settlement, the agreement states that the Commission has made no judgment on the merits of the claim. *Ibid.* To investigate a charge as quickly as possible and to improve the chances of an early informal resolution, the Commission holds a factfinding conference well before it makes a reasonable-cause decision, with each party presenting its version of the facts. 29 CFR § 1601.15 (c) (1979).

[6] Under Commission regulations, the employee may obtain a right-to-sue letter upon request once 180 days have passed from the filing of the

Title VII gives the Commission two formal means of obtaining information when it investigates a charge: The Commission may examine and copy evidence in the possession of the respondent employer, § 2000e–8 (a), and subpoena evidence and documents, § 2000e–9. Congress imposed on the Commission a duty to maintain this information in confidence. Section 706 (b) of Title VII directs that "[c]harges shall not be made public by the Commission." [7] If the Commission attempts informally to resolve a charge for which it has found reasonable cause, it cannot make "public" anything said or done in the course of the negotiations between the Commission and the parties; any Commission employee violating this prohibition faces criminal penalties. *Ibid.* Section 709 (e) of the statute supplements these prohibitions by making it a misdemeanor for any officer or employee of the Commission "to make public in any manner whatever any information" the Commission obtains through its investigative powers before the institution of any proceeding involving this information.[8]

Title VII nowhere defines "public." In its regulation governing disclosure, the Commission has construed the statute's prohibition of "public" release of information to permit prelitigation disclosure of charges and of investigative information to the parties where such disclosure "is deemed necessary for securing appropriate relief." 29 CFR § 1601.22 (1979). Specifically, the Commission has also created special disclosure rules permitting release of information in its files to charging parties or their attorneys, aggrieved persons in whose behalf charges have been filed and the persons or organizations who

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charge, 29 CFR § 1601.28 (a) (1) (1979), but the Commission may issue a right-to-sue letter earlier if it finds that it cannot complete its consideration of a charge within 180 days of filing, § 1601.28 (a) (2). The statute gives the employee 90 days from the Commission's notice of right to sue to file a private lawsuit. 42 U. S. C. § 2000e–5 (f) (1).

[7] See n. 1, *supra*.

[8] See n. 1, *supra*.

have filed the charges in their behalf, and respondents and their attorneys, so long as the request for the information is made in connection with contemplated litigation.[9] Though normally a person can see information in the file only for the case in which he is directly involved, the Commission sometimes allows a prospective litigant to see information in files of cases brought by other employees against the same employer where that information is relevant and material to the litigant's case. EEOC Compliance Manual § 83.7 (c).[10] Before disclosing any information, however, the Commission expunges the names, identifying characteristics, and statements of any witnesses who have been promised anonymity, as well as the names of any other respondents.[11] Moreover, any person requesting confidential information must execute a written agreement not to disclose the information to any other

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[9] A charging party, however, cannot obtain information under these rules until his right to sue has attached, unless he can demonstrate a compelling need for earlier disclosure. EEOC Compliance Manual § 83.3 (a).

[10] The Commission defines "relevant and material" as follows:

"Information in other case files is relevant or material when other case files contain charges, investigations or determinations involving the same basis (e. g., sex, religion, national origin, race) with limited exceptions such as when the private litigant's case alleged discrimination in promotion against females and the other case file involved a male's claim that he was not hired because of respondent's policy of not hiring long haired males. Other case files may be relevant or material if they involve a different basis only when the treatment afforded one protected class is probative of treatment afforded the private litigant's class (e. g., systemic discrimination against Spanish Surnamed Americans is often probative as to treatment accorded Blacks and vice versa)." EEOC Compliance Manual § 83.7 (c) (2).

However, whenever the Commission discloses to a charging party information from other case files, it does not reveal the identity of the other employees who brought charges against the employer. § 83.7 (c) (4).

[11] The Commission also expunges any records of or statements obtained in its informal settlement negotiations, except for information which the Commission can otherwise obtain under its statutory power to copy or subpoena evidence. See 42 U. S. C. §§ 2000e–8 (a), 2000e–9.

person, except as part of the normal course of litigation after a suit is filed.[12]

III

For the reasons that follow, we have concluded that Congress did not include charging parties within the "public" to whom disclosure of confidential information is illegal under the provisions of Title VII here at issue. Section 706 (b) states that "[c]harges shall not be made public." 42 U. S. C. § 2000e–5 (b). The charge, of course, cannot be concealed from the charging party. Nor can it be concealed from the respondent, since the statute also expressly requires the Commission to serve notice of the charge upon the respondent within 10 days of its filing. *Ibid.* Thus, the "public" to whom the statute forbids disclosure of charges cannot logically include the parties to the agency proceeding.[13] And we must infer that Congress intended the same distinction when it used the word "public" in § 709 (e), 42 U. S. C. § 2000e–8 (e). The two statutory provisions treat essentially the same subject, and, absent any congressional indication to the contrary, we must assume that "public" means the same thing in the two sections.[14]

The very limited legislative history of the disclosure provisions supports this reading. The bill passed by the House contained no restrictions on public disclosure. See H. R.

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[12] "Information in case files may be disclosed only on the condition that the person requesting disclosure agree in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII." EEOC Compliance Manual § 83.3 (b).

[13] The statute also forbids public disclosure of any matters arising in informal conciliation "without the written consent of the persons concerned." § 2000–e (5) (b). This phrase suggests that the parties, the "persons" whose consent would most obviously be necessary, are not members of the "public" to whom disclosure is forbidden.

[14] The language in § 709 (e) forbidding disclosure "in any manner whatever," seems clearly to refer to the means of publication, and not to the persons to whom disclosure is forbidden.

Rep. No. 914, 88th Cong., 1st Sess., 13 (1963).[15] The disclosure provisions were made part of the substitute bill which Senators Dirksen and Humphrey introduced in the Senate, and which the House later passed without amendment. See 110 Cong. Rec. 12819 (1964). Senator Humphrey, the cosponsor of the bill, explained that the purpose of the disclosure provisions was to prevent wide or unauthorized dissemination of unproved charges, not limited disclosures necessary to carry out the Commission's functions: "[T]his is a ban on *publicizing* and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute. . . . The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to *the general public* of unproven charges." *Id.*, at 12723 (emphasis added).[16] The parties to an agency proceeding are hardly

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[15] The House bill, however, did incorporate by reference the provisions of § 10 of the Federal Trade Commission Act, 38 Stat. 723, as amended, 15 U. S. C. § 50, which prohibit FTC employees from making "public any information obtained from the Commission without its authority . . . ." See H. R. 7152, 88th Cong., 1st Sess., § 710 (a) (1963). Under FTC rules construing § 10, the ban on disclosure applies only to unauthorized release of information, and does not prevent disclosure to parties to FTC proceedings. 16 CFR §§ 1.41, 1.133, 1.134 (1964) (current version at 16 CFR §§ 3.36, 4.10 (c) (1980)). Thus, in passing the substitute bill without amendment, the House may well have assumed that the express disclosure provisions in the Senate bill gave the Commission powers of disclosure similar to those under the FTC Act.

[16] The other cosponsor of the Senate bill, Senator Dirksen, explained § 706 (b)'s prohibition of any "public" disclosure of matters revealed during informal conciliation attempts as follows: "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy. If voluntary compliance with this title is not achieved, the dispute will be fully exposed to public view when a court suit is filed." 110 Cong. Rec. 8193 (1964). Senator Dirksen's explanation strongly suggests that the parties are considered part of the private efforts at conciliation, not members of the general public to whom the dispute will be "fully exposed" after litigation begins.

members of the "general public," especially since, as common sense and the express language of § 706 (b) show, see *supra*, at 598, they always have available to them the charge—proved or unproved—in the case to which they are parties.[17]

This reading of the statute, moreover, is consistent with the coordinated scheme of administrative and judicial enforcement which Congress created to enforce Title VII. See *supra*, at 595. First, limited disclosure to the parties can speed the Commission's required investigation: the Commission can more readily obtain information informally—rather

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[17] The principle that courts should respect an agency's contemporaneous construction of its founding statute, *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408, also supports this view of Title VII, since the Commission first issued its rule permitting disclosure to the charging party shortly after Congress created the EEOC in 1965. 30 Fed. Reg. 8407 (1965). Moreover, such a contemporaneous construction deserves special deference when it has remained consistent over a long period of time. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 210. The Commission's current regulation permitting such disclosure, 29 CFR § 1601.22 (1979), reflects no significant change from the original regulation. The original regulation permitted disclosure to the charging party "as may be appropriate or necessary to the carrying out of the Commission's functions . . . ." 30 Fed. Reg. 8409 (1965). The regulation was changed in 1977 to allow disclosure to the charging party's attorney as well as to the party himself, and to rephrase the controlling condition for disclosure as "where such disclosure is deemed necessary for securing appropriate relief." 42 Fed. Reg. 42024 (1977) (codified at 29 CFR § 1601.22 (1979)). In the 15 years during which the Commission has consistently allowed limited disclosure to the charging party, Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the Commission's practice. *United States* v. *Jackson*, 280 U. S. 183, 196–197. In 1972 Congress made major changes in Title VII, but the only change in the disclosure provisions was a very minor one in § 706 (b): Congress amended the provision requiring consent before disclosure of conciliation matters by replacing "consent of the parties" with "consent of the persons concerned." Section 706 (b) was also amended to permit charges to be filed "on behalf of" as well as by aggrieved parties, and the new phrase "persons concerned" was probably intended to conform to that change. See 118 Cong. Rec. 4941 (1972).

than through its formal powers under 42 U. S. C. § 2000e–9—if it can present the parties with specific facts for them to corroborate or rebut. Second, limited disclosure enhances the Commission's ability to carry out its statutory responsibility to resolve charges through informal conciliation and negotiation: A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own.[18]

The respondent argues vigorously that the disclosure of investigative information to charging parties may encourage many lawsuits that would not otherwise be filed, and thus contravene the congressional policy of relying on administrative resolution and settlement. But the effect of limited disclosure may be just the opposite. The employee has little to gain from filing a futile lawsuit, and indeed faces the possibility of an adverse fee award if the suit is frivolous.

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[18] When the Commission issues its decision on whether there is probable cause to believe the charge is true, it explains the factual bases for its conclusion. EEOC Compliance Manual §40.7. A positive finding may thereby be a spur to settlement; a negative finding may deter the employee from filing a frivolous lawsuit. If the Commission were not allowed to disclose to the parties essential facts it obtained during its investigation, it would be able to announce no more than its bare conclusion on reasonable cause, and these important benefits of the reasonable-cause determination would be lost.

Moreover, a charging party who consents to a settlement negotiated by the Commission waives his right to file a civil action. 42 U. S. C. § 2000e–5 (f) (1); see *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 364. Of course, anyone who settles a case gives up the right to litigate it. But Title VII places employment discrimination claimants in an especially difficult position by forcing them to yield initial control of their potential lawsuits to the Commission, which, in reaching agreement with the employer, might have interests different from those of the employee. It seems unlikely that Congress would force a Title VII charging party, who would have difficulty resisting the opportunity to enter the agreement negotiated by the Commission, to waive his statutory right to litigate when he cannot know the essential facts obtained in the Commission's investigations.

Christiansburg Garment Co. v. *EEOC*, 434 U. S. 412, 421. Pointless litigation burdens both the parties and the federal courts, and it is in the interest of all concerned that the charging party have adequate information in assessing the feasibility of litigation. Under the respondent's view of the statute, however, the charging party would be able to obtain that information only after filing a lawsuit. See 42 U. S. C. § 2000e–8 (e). Thus, a charging party would have to file suit in a hopeless case in order to discover that the case was hopeless.[19] The Commission's disclosure practice may therefore help fulfill the statutory goal of maximum possible reliance upon voluntary conciliation and administrative resolution of claims.

In any event, even if disclosure may encourage litigation in some instances, that result is not inconsistent with the ultimate purposes of Title VII.[20] The private right of action remains an important part of Title VII's scheme of enforcement, *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 45. Congress considered the charging party a "private attorney general," whose role in enforcing the ban on discrimination is parallel to that of the Commission itself. *Christiansburg Garment Co.* v. *EEOC, supra*, at 421.[21] The private litigant

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[19] An impecunious employee would be unlikely to be able to conduct a thorough investigation of his own after he filed a charge, and therefore would be tempted to file a lawsuit so that he could request appointed counsel, 42 U. S. C. § 2000e–5 (f)(1), if the statute did not allow the Commission to give him essential investigative information before he filed suit.

[20] The filing of a private lawsuit may actually encourage settlement. See *Young* v. *International Telephone & Telegraph Co.*, 438 F. 2d 757, 764 (CA3).

[21] The legislative history of the 1972 amendments to Title VII reflects a strong reaffirmation of the importance of the private right of action in the Title VII enforcement scheme:

"The retention of the private right of action . . . is intended to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Com-

could hardly play that role without access to information needed to assess the feasibility of litigation.

IV

Nevertheless, though Congress allowed disclosure of investigative information in a charging party's file to that party himself, nothing in the statute or its legislative history reveals any intent to allow the Commission to reveal to that charging party information in the files of other charging parties who have brought claims against the same employer. See EEOC Compliance Manual § 83.7 (c).[22] As noted earlier, the charging party cannot logically be a member of the "public" to whom disclosure is forbidden by § 706 (b) of Title VII, and, by extension, cannot be a member of the public under § 709 (e). See *supra*, at 598. The reason, however, is that the charging party is obviously aware of the charge he has filed, and so cannot belong to the public to which Congress referred when it directed that "[c]harges shall not be made public." 42 U. S. C. § 2000e–5 (b).

But there is no reason why the charging party should know the content of any other employee's charge, and he must be considered a member of the public with respect to charges filed by other people. With respect to all files other than his own, he is a stranger.

The Commission notes that it often consolidates substantially similar charges for investigation, and in other instances draws upon information generated in an earlier investigation of the same employer. The Commission therefore argues that because information in one party's file may be directly

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mission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint. . . .

"It is hoped that recourse to the private lawsuit will be the exception and not the rule. . . . However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief." 118 Cong. Rec. 7565 (1972) (Section-by-Section analysis).

[22] See n. 10, *supra*.

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relevant to another party's charge, it would be burdensome for it to have to reproduce the generally relevant information for each file, and unfair to a charging party to deny him access to generally relevant information that, by chance of timing, appears first and fully in another party's file.

But the Commission's argument is merely one of administrative convenience, and such convenience cannot override the prohibitions in the statute. Statistics and other information about an employer's general practices may certainly be relevant to individual charges of discrimination, *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 804–805, but by including such information, in full or summary form, in each individual charging party's file, the Commission can fully comply with the statute while giving each party the information he needs to weigh the strength of his own case.

V

The Court of Appeals erred, therefore, in holding that the respondent had a categorical right to refuse to comply with the EEOC subpoena unless the Commission assured it that the information supplied would be held in absolute secrecy. The respondent was entitled only to assurance that each employee filing a charge against Horne would see information in no file other than his or her own. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

In my view, the proper standard for evaluating disclosures of information by the Equal Employment Opportunity Com-

mission (EEOC) was expressed by Senator Humphrey, the cosponsor of the bill that became Title VII. As the Court notes, *ante*, at 598–600, Senator Humphrey stated that the prohibitions against public disclosure in §§ 706 (b) and 709 (e) of Title VII, 42 U. S. C. §§ 2000e–5 (b) and 2000e–8 (e), do not forbid "such disclosure as is necessary to the carrying out of the Commission's duties under the statute." 110 Cong. Rec. 12723 (1964). I would adhere to this standard and require the Commission to justify any disclosure of its investigative files by demonstrating that the disclosure is "necessary to the carrying out of [its] duties."* Because the Commission must communicate charges to respondents, investigate the charges that have been filed, determine whether there is reasonable cause to believe that the charges are true, inform the parties of its determination, and attempt to settle charges, see § 706 (b), there undoubtedly are many occasions when it must disclose some of its information to the parties and to witnesses. The Court of Appeals erred, therefore, when it held that no disclosure to parties and witnesses is permitted before a suit is filed.

The Commission, however, has not pointed to any provision

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*As the Court notes, the agency adopted precisely this standard as a contemporaneous construction of the statute. Its first disclosure rules, issued in 1965, authorized disclosure to the charging party "as may be appropriate or necessary to the carrying out of the Commission's function." 30 Fed. Reg. 8409 (1965). This regulation remained unchanged until 1977, when it was amended to state a broader standard, although the agency disclaimed an intent to do so. See 42 Fed. Reg. 42024 (1977). Disclosure to a charging party, his or her attorney, and certain others is now permitted when it "is deemed necessary for securing appropriate relief." 29 CFR § 1601.22 (1979). That this is a departure from the previous standard is clear, since the Commission retained the "necessary to the carrying out of the Commission's function" language for disclosures of information to interested federal, state, or local authorities. *Ibid.*

The Regulations in the EEOC Compliance Manual which set forth the agency's prelitigation disclosure program were first adopted in 1975. They hardly can be called a contemporaneous construction of Title VII.

of Title VII imposing a duty upon it to allow charging parties access to its records "for the purpose of reviewing information in the case file in connection with pending or contemplated litigation." EEOC Compliance Manual § 83.3 (a). I do not find it necessary to resolve the disagreement between the Commission and respondent over whether the Commission's prelitigation disclosure rules are a help or a hindrance to the effective enforcement of Title VII. I simply find no provision of the statute authorizing the Commission to assist charging parties who are trying to decide whether to file a suit.

The Court of Appeals held that the prelitigation disclosure rules are invalid. I would affirm that part of its judgment.

JUSTICE STEVENS, dissenting.

The Court construes a prohibition against public disclosure as an authorization for prelitigation discovery. A principal basis for the Court's unusual construction of rather plain statutory language is that because a charging party must know the contents of a charge, that party cannot be a member of the public to which disclosure is prohibited. In my view, the reason that the statute is not violated by the charging party's knowledge of the contents of a charge is that he is the source of the information contained in the charge; no disclosure occurs when he reads what he has written, regardless of whether he is a member of the public.

To encourage prompt and full disclosure of relevant information to a neutral conciliator, Congress assured employees and employers alike that no public disclosure of such information would occur prior to the institution of formal proceedings. To enforce this assurance, the statute imposes criminal penalties on Commission personnel who disclose information to the public. See 42 U. S. C. § 2000e–8 (e).[1] It seems fanciful to

[1] A violation of the disclosure prohibition contained in § 2000e–8 (e) is a misdemeanor punishable by 1-year imprisonment and a $1,000 fine.

me to conclude that Congress intended to prohibit direct disclosure while permitting indirect disclosure. That result, however, is the consequence of the Court's view that direct disclosure may be made to a fairly large group of persons who can then pass the information along to others.[2] Although Commission rules do provide that such persons shall agree not to make disclosed information public to others, neither the statutes nor the regulations contain any sanction for the violation of that sort of agreement.[3] If Congress had regarded this group as members of some nonpublic category, I believe that Congress would have expressly prohibited them from making any public disclosure of the confidential information they receive from the Commission.[4] The Court's reading of the statute shows little respect for the drafting ability of Congress.

I therefore agree with the Court of Appeals for the Fourth Circuit that the statute should be interpreted in accordance with its plain meaning.

Accordingly, I respectfully dissent.

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[2] The persons to whom special disclosure is permitted, as described by the Court, include parties or their attorneys, aggrieved persons in whose behalf charges have been filed, and the persons or organizations who have filed the charges in their behalf, and respondents and their attorneys. See *ante*, at 596–597.

[3] The consequences of a violation surely do not include the criminal penalties that the statute expressly authorizes when Commission personnel make public disclosure.

[4] The Commission argues that it could prevent further disclosure by seeking injunctive and compensatory relief for breach of the agreement not to disclose the information to others. Brief for Petitioner 37–38, n. 24. This remedy may ameliorate the practical consequences of the Commission's regulation, but the existence of such a remedy does not answer the question of why Congress provided no express sanction for further disclosure by this nonpublic category.

WALTER FLEISHER CO., INC. *v.* COUNTY OF LOS ANGELES ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 79-700. Argued November 4, 1980—Decided January 26, 1981

Affirmed by an equally divided Court.

Gerald T. Manpearl argued the cause and filed a brief for petitioner.

Philip H. Hickok argued the cause for respondents. With him on the brief were *John H. Larson* and *DeWitt W. Clinton.**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE STEWART took no part in the decision of this case.

**Joanne M. Garvey, Michael Wells,* and *Roy E. Crawford* filed a brief for the Committee on Unitary Tax as *amicus curiae.*

Syllabus

CONSOLIDATED RAIL CORPORATION ET AL. *v.* NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-568. Decided January 26, 1981

After conducting the investigation required by §§ 204 (a) (1) and (2) of the Railroad Revitalization and Regulatory Reform Act of 1976, the Interstate Commerce Commission ultimately concluded that the rail rate structure for recyclable and competing virgin materials unjustly discriminated against certain recyclables and that, in general, rates for recyclables were unreasonable high if they produced a revenue-to-variable cost ratio exceeding 180%. The Commission's order, with regard to the elimination of discrimination, permitted the railroads to raise the rates for recyclables and competing virgin materials to a level above the previous levels for either commodity, if the new rate did not produce revenue in excess of the 180% ratio. The Court of Appeals affirmed as to the Commission's findings on discrimination, but concluded that the Commission had erred as to the scope of the remedy and had failed adequately to justify the 180% ratio as indicative of reasonableness. The court revoked the resulting rate increases for recyclables; remanded for a determination of whether the 180% ratio, or some other formula, provided the appropriate standard for determining reasonableness; and, until such a standard had been adequately justified, enjoined implementation of any rate increase for recyclables, except one caused by a general rate increase.

Held: While the Court of Appeals had the power to order further proceedings to determine the propriety of the 180% ratio standard, it had no power to revoke rates implemented under the standard and to enjoin any further increases toward the 180% level. The court did not reject the 180% ratio standard outright, but remanded to the Commission for further proceedings which could either produce a new standard or clarify the basis for the 180% ratio. Such a posture provides no basis for either revoking or enjoining rate increases.

Certiorari granted; 201 U. S. App. D. C. 342, 627 F. 2d 1328, vacated in part and remanded.

PER CURIAM.

Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94–210, 90 Stat. 40, note following 45 U. S. C. § 793, directed the Interstate Commerce Commission to conduct an investigation to determine whether the rail rate structure for recyclable and competing virgin materials unjustly discriminates against recyclables or whether such rates are unreasonable, and, if found to be so, to require the removal of any such defect from the structure. The Act demonstrated congressional concern that rail rates may have been unjustly impeding the movement of recycled materials in a market of diminishing virgin resources. S. Rep. No. 94–499, p. 51 (1975).

After conducting the investigation required by §§ 204 (a) (1) and (2), the Commission concluded that the rail rate structure was neither discriminatory with respect to recyclable materials, nor, with few exceptions, unreasonable. *Investigation of Freight Rates for the Transportation of Recyclable or Recycled Commodities*, 356 I. C. C. 114 (1977). The Court of Appeals for the District of Columbia Circuit reversed, finding that the Commission had applied an overly restrictive definition of "competitive" in assessing whether particular commodities were comparable for purposes of determining discrimination, and that the Commission had improperly shifted the burden of proof from the railroads. *National Association of Recycling Industries, Inc.* v. *ICC*, 190 U. S. App. D. C. 118, 585 F. 2d 522 (1978). The case was remanded with orders to the Commission to conduct an expedited investigation which would remedy these errors.

On remand, the Commission found that certain recyclable materials were being discriminated against in the rate structure and concluded that, in general, rates for transportation of recyclables were unreasonably high if they produced a revenue-to-variable cost ratio exceeding 180%. The Commission ordered the elimination of all rate discrimination and

ordered that rates for recyclable materials which produced revenue in excess of the 180% ratio be reduced accordingly. *Investigation of Freight Rates for Transportation of Recyclable or Recycled Commodities,* 361 I. C. C. 238 (1979). In eliminating the discrimination, the railroads were free to use any combination of raising or lowering rates which would equalize rates for recyclable and competing virgin materials, so long as the resulting rate would not be unreasonable. *Investigation of Freight Rates for Transportation of Recyclable or Recycled Commodities,* 361 I. C. C. 641 (1979). Under this approach, the railroads could raise the rates for recyclable material and competing virgin material to a level above the previous levels for either commodity, if the new rate did not produce revenue in excess of the 180% ratio.

The Court of Appeals affirmed with respect to the Commission's findings on discrimination. *National Association of Recycling Industries, Inc.* v. *ICC,* 201 U. S. App. D. C. 342, 627 F. 2d 1328 (1980). However, the court found fault with the scope of the Commission's remedy for eliminating discrimination and with the Commission's failure adequately to justify the 180% ratio as indicative of reasonableness. The court revoked all rate increases for recyclable material put into effect pursuant to those perceived errors and remanded for further proceedings. In a supplementary order, the court made it clear that the central task on remand would be to determine whether the 180% ratio, or some other formula, provided the appropriate standard for determining reasonableness. Until such a standard had been adequately justified, the court enjoined implementation of any rate increase for recyclable material, excepting one caused by a general rate increase.

The railroads sought certiorari, challenging only those aspects of the Court of Appeals' decision which revoked or enjoined rate increases.* The argument is that the lower

*On October 14, 1980, the President signed into law the Staggers Rail

court was without authority to enter such orders. We agree. The authority to determine when any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 662–672 (1963). While the Court of Appeals was not without power to order further proceedings to determine the propriety of the 180% ratio standard, the court stepped beyond the proper exercise of its power when it revoked rates implemented under the standard and enjoined any further increases toward the 180% level. The basis for these remedies was the court's conclusion that the Commission had failed to adequately support the choice of the 180% figure. That standard was not rejected outright; the court's opinion leaves open the possibility that the 180% ratio may eventually prevail.

Under the above circumstances, there is no basis in our prior decisions for the revocation order or for the injunction against further increases. "If a reviewing court cannot discern [the Commission's] policies, it may remand the case to the agency for clarification and further justification of the departure from precedent. . . . When a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission." *Atchison, T. & S. F. R. Co.* v. *Wichita Board of Trade*, 412 U. S. 800, 822 (1973); see *United States* v. *SCRAP*, 412 U. S. 669, 690–698 (1973); *Arrow Transportation Co.* v. *Southern R. Co., supra;* see also *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444 (1979).

Act of 1980, Pub. L. 96–448, 94 Stat. 1895. Section 204 of the Act amends 49 U. S. C. § 10731 (1976 ed, Supp. III) so as to provide guidelines under which the Commission must develop a new revenue-to-variable cost standard for all recyclables excepting iron and steel scrap. Congress has estimated that that ratio would not exceed 160%. S. Rep. No. 96–470, p. 34 (1979). Although the Act may result in the Commission's adoption of a standard lower than 180%, that factor has no bearing on the Court of Appeals' power to revoke or enjoin the rate increases at issue here.

Here, the court was dissatisfied with the Commission's justification for adopting the 180% standard, and the case was remanded for further proceedings which could either produce a new standard or clarify the basis for the 180% ratio. Such a posture provides no basis for either revoking or enjoining rate increases under the above authorities. Accordingly, the petition for a writ of certiorari is granted, those portions of the Court of Appeals decision revoking or enjoining rate increases are vacated, and the case is remanded for proceedings consistent with the immediate disposition.

So ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

Reporter's Note

The next page is purposely numbered 801. The numbers between 613 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 6, 1980, THROUGH FEBRUARY 10, 1981

OCTOBER 6, 1980

Appeals Dismissed

No. 79–1483. SUPERMARKETS GENERAL CORP., T/A HOCHSCHILD KOHN DEPARTMENT STORE *v.* MARYLAND. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 286 Md. 611, 409 A. 2d 250.

No. 79–1594. BOWEN *v.* BOWEN. Appeal from Ct. Civ. App. Tex., 11th Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 79–1703. FULKERSON *v.* STATE BAR OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 79–1772. CALDERONE *v.* FERRIGNO, ADMINISTRATOR, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK CITY, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal question. Reported below: 69 App. Div. 2d 901, 416 N. Y. S. 2d 158.

No. 79–1776. HARDING *v.* MELTON, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 49 N. Y. 2d 739, 402 N. E. 2d 1171.

No. 79–1819. UNITED ILLUMINATING CO. ET AL. *v.* CITY OF NEW HAVEN ET AL. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 179 Conn. 627, 427 A. 2d 830.

No. 79–1880. LAKE LAWRENCE, INC. *v.* THURSTON COUNTY ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 92 Wash. 2d 656, 601 P. 2d 494.

No. 79–1989. CITIZENS PARTY ET AL. *v.* MANCHIN, SECRETARY OF STATE OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. Reported below: — W. Va. —, 270 S. E. 2d 634.

No. 79–2028. ALDENS, INC. *v.* TULLY ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 49 N. Y. 2d 525, 404 N. E. 2d 703.

No. 79–2066. BEER ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 408 Mich. 957.

No. 79–6281. IN RE ADOPTION OF E. M. A. (DIXON, APPELLANT). Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 487 Pa. 152, 409 A. 2d 10.

No. 79–6825. CATER *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of substantial federal question. Reported below: 78 Ill. App. 3d 983, 398 N. E. 2d 28.

No. 80–21. HEART MINISTRIES, INC., ET AL. *v.* KANSAS EX REL. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 227 Kan. 244, 607 P. 2d 1102.

No. 80–32. HYNNING *v.* DUFIEF MORTGAGE, INC., ET AL. Appeal from Cir. Ct. Arlington County, Va., dismissed for want of substantial federal question.

No. 80–51. BRIDGES *v.* VIRGINIA DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 220 Va. lxvii.

No. 80–61. FULTZ *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 596 S. W. 2d 28.

No. 80–90. NATIONAL WOOD PRESERVERS, INC. *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL.; and

No. 80–98. ROGERS ET UX. *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL. Appeals from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 489 Pa. 221, 414 A. 2d 37.

No. 80–144. UNITED FEDERATION OF TEACHERS WELFARE FUND *v.* STATE HUMAN RIGHTS APPEAL BOARD ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question.

No. 80–5065. JEROKOVITCH *v.* RICCIUTI ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 488 Pa. 537, 412 A. 2d 1106.

No. 79–1530. TOWN *v.* RENO, STATE ATTORNEY OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 377 So. 2d 648.

No. 79–1889. RIVERA *v.* OREGON STATE EMPLOYEES ASSN. ET AL. Appeal from D. C. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5093. PAYNE *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 596 S. W. 2d 911.

No. 79–1969. ACKERLEY COMMUNICATIONS, INC., ET AL. *v.* CITY OF SEATTLE ET AL.; and

No. 79–1972. DIAMOND PARKING, INC. *v.* CITY OF SEATTLE. Appeals from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 92 Wash. 2d 905, 602 P. 2d 1177.

No. 79–2026. SALORIO ET AL. *v.* GLASER, DIRECTOR, DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 82 N. J. 482, 414 A. 2d 943.

No. 79–6626. WILLIAMS *v.* MISSISSIPPI. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 608 F. 2d 1021.

No. 79–6634. LINDEN *v.* ST. MARTIN'S PRESS ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6678. DONNELLY *v.* MIDDLESEX SUPERIOR COURT ET AL. Appeal from Ct. App. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Mass. App. ——, 399 N. E. 2d 37.

No. 79–6646. PRENZLER *v.* REED. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6652. RODRIGUEZ *v.* UNITED STATES ARMY ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6672. CASEY *v.* AULT, CORRECTIONS DIRECTOR. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6820. BRACKETT *v.* ESTELLE, CORRECTIONS DIRECTOR. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6847. HARSHFIELD *v.* RICKETTS, CORRECTIONS DIRECTOR, ET AL. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6866. MASONE *v.* MASONE. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 49 N. Y. 2d 916, 405 N. E. 2d 713.

No. 79–6898. GRADY ET AL. *v.* MCLEAN. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 73 App. Div. 2d 1067, 425 N. Y. S. 2d 439.

No. 80–138. VANDERLINDEN, EXECUTOR *v.* VANDERLINDEN, EXECUTOR. Appeal from Ct. App. Iowa dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 297 N. W. 2d 382.

No. 80–80. PRINCE GEORGE'S PROPERTIES, INC. *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 44 Md. App. 759.

No. 80–5018. BRESSLER *v.* FIRST APPELLATE COURT OF CALIFORNIA, DISTRICT ONE, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5079. REED *v.* SCHWAB ET AL. Appeal from Sup. Ct. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–1720. DOVE ET AL. *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: —— Ind. ——, 397 N. E. 2d 580.

No. 79–1846. NEW HAMPSHIRE ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 616 F. 2d 240.

No. 79–1722. PITSENBERGER *v.* PITSENBERGER. Appeal from Ct. App. Md. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question. Reported below: 287 Md. 20, 410 A. 2d 1052.

No. 79–1865. OSTRAGER *v.* STATE BOARD OF CONTROL ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 99 Cal. App. 3d 1, 160 Cal. Rptr. 317.

No. 79–1939. VARA ET AL. *v.* CITY OF HOUSTON ET AL. Appeal from Ct. Civ. App. Tex., 14th Sup. Jud. Dist., dismissed for want of properly presented federal question. Reported below: 583 S. W. 2d 935.

No. 79–2041. CLAYTON *v.* CENTRAL SCHOOL DISTRICT No. 1 OF THE TOWNS OF CONKLIN ET AL. Appeal from Ct. App. N. Y. dismissed for want of properly presented federal question. Reported below: 49 N. Y. 2d 888, 405 N. E. 2d 235.

No. 79–6519. ZACKAI *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY. Appeal from Sup. Ct. Ill. dismissed for want of properly presented federal question. Reported below: 78 Ill. 2d 143, 399 N. E. 2d 590.

No. 79–2033. WOODWARD, ADMINISTRATOR *v.* BURNHAM CITY HOSPITAL ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 79 Ill. 2d 295, 402 N. E. 2d 560.

No. 80–14. FAYETTEVILLE STREET CHRISTIAN SCHOOL ET AL. *v.* NORTH CAROLINA ET AL. Appeal from Sup. Ct. N. C. dismissed for want of jurisdiction. Reported below: 299 N. C. 351, 261 S. E. 2d 908.

No. 79–6630. ROCHE *v.* BIG MOOSE OIL FIELD TRUCK SERVICE ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 381 So. 2d 396.

No. 79–6719. CONRAD *v.* PENN ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 79–2044. NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* HUFSTEDLER, SECRETARY OF EDUCATION, ET AL. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 489 F. Supp. 1248.

No. 80–77. LOPEZ, GUARDIAN *v.* CITY OF DAYTON, OHIO, ET AL. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of jurisdiction.

No. 80–125. MEADS ET AL. *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 79–1938. MITCHELL, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF UTAH, ET AL. *v.* D. R. Appeal from C. A. 10th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Harris* v. *McRae*, 448 U. S. 297 (1980), and *Williams* v. *Zbaraz*, 448 U. S. 358 (1980). JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, would affirm the judgment of the United States Court of Appeals for the Tenth Circuit. He therefore dissents and does so for the reasons set forth in the respective dissenting opinions filed by him and JUSTICE BRENNAN in *Harris* v. *McRae* and its companion cases, 448 U. S., at 348 and 329. Reported below: 617 F. 2d 203.

Certiorari Granted—Vacated and Remanded

No. 79–1557. MASSACHUSETTS *v.* HURLEY. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). Reported below: 379 Mass. 456, 405 N. E. 2d 97.

No. 79–1602. MISSOURI *v.* MORGAN. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Whalen* v. *United States*, 445 U. S. 684 (1980). Reported below: 592 S. W. 2d 796.

No. 79–1751. NEW YORK *v.* CONYERS. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Jenkins* v. *Anderson*, 447 U. S. 231 (1980). Reported below: 49 N. Y. 2d 174, 400 N. E. 2d 342.

No. 79–1789. COTTON WAREHOUSE ASSN. ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607 (1980). Reported below: 199 U. S. App. D. C. 54, 617 F. 2d 636.

No. 79–1796. FREEMAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harris* v. *McRae*, 448 U. S 297 (1980); *Williams* v. *Zbaraz*, 448 U. S. 358 (1980); and *Maher* v. *Gagne*, 448 U. S. 122 (1980). JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissents and does so for the reasons set forth in the respective dissenting opinions filed by him

and JUSTICE BRENNAN in *Harris* v. *McRae* and its companion cases, 448 U. S., at 348 and 329. Reported below: 614 F. 2d 585.

No. 79–2003. CALIFORNIA *v.* LANPHEAR. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Adams* v. *Texas*, 448 U. S. 38 (1980). Reported below: 26 Cal. 3d 814, 608 P. 2d 689.

No. 79–2004. FRANZEN ET AL. *v.* SMITH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Jenkins* v. *Anderson*, 447 U. S. 231 (1980). Reported below: 618 F. 2d 1204.

No. 79–6514. LEWIS *v.* LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). Reported below: 612 F. 2d 577.

No. 79–6770. GAVIN *v.* ANDERSON, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Attorney General of Michigan in his memorandum filed September 2, 1980. JUSTICE REHNQUIST dissents. Reported below: 620 F. 2d 302.

No. 80–5006. COON *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Beck* v. *Alabama*, 447 U. S. 625 (1980). Reported below: 380 So. 2d 990.

Certiorari Dismissed

No. 79–1996. DISTRICT ATTORNEY OF SACRAMENTO COUNTY *v.* SACRAMENTO COUNTY CIVIL SERVICE COMMISSION ET AL. Sup. Ct. Cal. Certiorari dismissed as moot. Reported below: 26 Cal. 3d 257, 604 P. 2d 1365.

No. 80–5122. BROWNELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari dismissed for want of jurisdiction. Reported below: 79 Ill. 2d 508, 404 N. E. 2d 181.

Miscellaneous Orders

No. A–1020 (O. T. 1979). GIOVINAZZI *v.* NEW JERSEY. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–1177 (O. T. 1979). JAFFER *v.* CITY OF MIAMI ET AL. Cir. Ct. Fla., Dade County. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–161. VON MEDLIN ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ (COUNTY OF SANTA CRUZ, REAL PARTY IN INTEREST). Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A–232. MOBLEY ET AL. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Application for stay of adoption, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–238. RAPIDES PARISH SCHOOL BOARD ET AL. *v.* VALLEY ET AL. D. C. W. D. La. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 5, Orig. UNITED STATES *v.* CALIFORNIA. The Solicitor General is requested to file a response to the petition for rehearing within 30 days. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier decision herein, see, *e. g.*, 447 U. S. 1.]

No. 1, Orig. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 2, Orig. MICHIGAN *v.* ILLINOIS ET AL.; and

No. 3, Orig. NEW YORK *v.* ILLINOIS ET AL. Report of the Special Master received and ordered filed. Exceptions, if any, to the report may be filed within 14 days. Replies, if any, to the exceptions may be filed within seven days. Report of the Special Master with respect to costs received and ordered filed. JUSTICE MARSHALL took no part in the consideration or decision of these orders. [For earlier order herein, see, *e. g.*, 441 U. S. 921.]

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Report of the Special Master on Motions of the Plaintiffs for Judgment on the Pleadings and of the Defendant for Dismissal of the Complaint received and ordered filed. Report of the Special Master filed May 14, 1980, and Report of the Special Master filed October 6, 1980, are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 447 U. S. 902.]

No. 78–1841. CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ADAMS. C. A. 3d Cir. [Certiorari granted, 444 U. S. 1069.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 79–395. UNITED STATES *v.* MORRISON. C. A. 3d Cir. [Certiorari granted, 448 U. S. 906.] Motion of respondent for appointment of counsel granted, and it is ordered that Salvatore J. Cucinotto, Esquire, of Philadelphia, Pa., be appointed to serve as counsel for respondent in this case.

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 1069.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. [Certiorari granted, 445 U. S. 926.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–900. FEDERAL TRADE COMMISSION ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA. C. A. 9th Cir. [Certiorari granted, 445 U. S. 903.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 79–983. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 1068]; and No. 79–1689. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 447 U. S. 919.] Motion of appellees for divided argument granted.

No. 79–1260. CHANDLER ET AL. *v.* FLORIDA. Sup. Ct. Fla. [Probable jurisdiction noted, 446 U. S. 907.] Motion of CBS, Inc., for leave to file a brief as *amicus curiae* granted. Motion of Post-Newsweek Stations, Florida, Inc., for leave to participate in oral argument as *amicus curiae* denied.

No. 79–1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. [Certiorari granted, 446 U. S. 917.] Motions of Securities Industry Association and National Committee of Discount Security Brokers for leave to participate in oral argument as *amici curiae* denied.

No. 79–1356. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. [Certiorari granted, 448 U. S. 910.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted, and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 79–1336. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* KALO BRICK & TILE CO. Ct. App. Iowa. [Certiorari granted, 446 U. S. 951.] Motion of the Solicitor General for additional time for oral argument as *amicus curiae* granted, and five additional minutes allotted for that purpose. Respondent also allotted an additional five minutes for oral argument.

No. 79–1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.;

No. 79–1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79–1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79–1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79–1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motion of petitioners to dispense with printing appendix denied.

No. 79–1515. UNITED STATES *v.* SWANK ET AL. Ct. Cl. [Certiorari granted, 446 U. S. 934.] Motions of respondents for additional time for oral argument and for divided argument denied.

No. 79–1896. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. Ct. App. La., 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE STEWART took no part in the consideration or decision of this order.

No. 79–6436. RAY *v.* SOWDERS, REFORMATORY SUPERINTENDENT, 446 U. S. 969. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 79–1601. SUMNER, WARDEN *v.* MATA. C. A. 9th Cir. [Certiorari granted, 448 U. S. 910.] Motion of petitioner to dispense with printing appendix denied. Motion of respondent for appointment of counsel granted, and it is ordered that Ezra Hendon, Esquire, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 79–1841. GRANDDAD BREAD, INC. *v.* CONTINENTAL BAKING CO. C. A. 9th Cir.;

No. 79–1856. EATON CORP. *v.* FOX. C. A. 6th Cir.;

No. 79–1922. CENTRAL OF GEORGIA RAILROAD CO. *v.* HENDLEY. C. A. 5th Cir.;

No. 79–1953. FREEMAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* CHAMBLY ET AL. C. A. 8th Cir.;

No. 79–2059. AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* CITY OF MISHAWAKA, INDIANA, ET AL. C. A. 7th Cir.;

No. 80–60. HERWEG ET VIR *v.* RAY, GOVERNOR OF IOWA, ET AL. C. A. 8th Cir.; and

No. 80–146. SHIFFRIN ET AL. *v.* BRATTON ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–1835. ROBERTS *v.* RANDALL, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of certiorari and/or other relief denied.

No. 79–6689. STEELMAN *v.* RICKETTS, CORRECTIONS DIRECTOR, ET AL.;

No. 79–6896. STEELMAN *v.* RICKETTS, CORRECTIONS DIRECTOR, ET AL.; and

No. 80–5196. IN RE OLIVER. Motions for leave to file petitions for writs of habeas corpus denied.

No. 79–1527. ALASKA ET AL. *v.* MCGLYNN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 79–1787. LEONARD M. *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT (CALIFORNIA, REAL PARTY IN INTEREST);

No. 79–6742. REINER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL.;

No. 79–6748. WHITE *v.* LIVELY, U. S. CIRCUIT JUDGE, ET AL.;

No. 80–163. IN RE CHESTNUTT MANAGEMENT CORP.;

No. 80–5181. IN RE GREEN; and

No. 80–5185. IN RE GREEN. Motions for leave to file petitions for writs of mandamus denied.

No. 79–6648. WRIGHT *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 79–6804. JACKSON ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. Motion for leave to file petition for writ of mandamus and prohibition denied.

No. 79–6699. PAUL *v.* STAFFORD, U. S. DISTRICT JUDGE;

No. 80–5155. IN RE HERNANDEZ; and

No. 80–5164. IN RE ALLEN. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

No. 79–2018. MAROULIS *v.* COUNTY COURT OF DUTCHESS COUNTY ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 79–1740. BALL ET AL. *v.* JAMES ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 613 F. 2d 180.

No. 80–231. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* INDIANA ET AL. Appeal from D. C. S. D. Ind. Probable jurisdiction noted. Reported below: 501 F. Supp. 452.

No. 79–1423. WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted. Reported below: 99 Cal. App. 3d 410, 159 Cal. Rptr. 539.

No. 79–1538. ANDRUS, SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL.; and

No. 79–1596. VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. Appeals from D. C. W. D. Va. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 483 F. Supp. 425.

No. 79–6779. LITTLE *v.* STREATER. Appeal from App. Sess., Super. Ct. Conn., New Haven Jud. Dist. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

No. 79–1952. CALIFORNIA MEDICAL ASSN. ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Appeal from C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 641 F. 2d 619.

Certiorari Granted

No. 79–1429. AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL.; and

No. 79–1583. NATIONAL COTTON COUNCIL OF AMERICA *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari in No. 79–1429 granted limited to Questions 1, 2, and 4 presented by the petition. Certiorari in No. 79–1583 granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 199 U. S. App. D. C. 54, 617 F. 2d 636.

No. 79–1252. CALIFORNIA ET AL. *v.* SIERRA CLUB ET AL.; and

No. 79–1502. KERN COUNTY WATER AGENCY ET AL. *v.* SIERRA CLUB ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 610 F. 2d 581.

No. 79–1890. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* ALASKA ET AL.; and

No. 79–1904. KENAI PENINSULA BOROUGH *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 612 F. 2d 1210.

No. 79–1977. RODRIGUEZ *v.* COMPASS SHIPPING CO., LTD., ET AL.; PEREZ *v.* ARYA NATIONAL SHIPPING LINE, LTD.; and BARULEC *v.* OVE SKOU, R. A. C. A. 2d Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 617 F. 2d 955 (first case); 622 F. 2d 575 (second case); 622 F. 2d 572 (third case).

No. 80–45. JOHNSON *v.* J. O. L. Ct. App. D. C. Certiorari granted and case set for oral argument in tandem with No. 79–5932, *Doe et al.* v. *Delaware* [probable jurisdiction noted, 445 U. S. 942]. Reported below: 409 A. 2d 1073.

No. 80–83. MUSKIE, SECRETARY OF STATE *v.* AGEE. C. A. D. C. Cir. Certiorari granted. Motion of respondent to vacate the stay heretofore entered by THE CHIEF JUSTICE denied. Reported below: 203 U. S. App. D. C. 46, 629 F. 2d 80.

No. 79–1709. ALBERNAZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 612 F. 2d 906.

No. 79–1907. COMMISSIONER OF INTERNAL REVENUE *v.* PORTLAND CEMENT COMPANY OF UTAH. C. A. 10th Cir. Certiorari granted. Reported below: 614 F. 2d 724.

No. 79–1944. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. Certiorari granted. Reported below: 607 F. 2d 1133.

No. 79–2006. BARRENTINE ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. C. A. 8th Cir. Motion of respondents to dismiss the memorandum for the United States as *amicus curiae* granted. Certiorari granted. Reported below: 615 F. 2d 1194.

No. 79–6423. LASSITER *v.* DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY. Ct. App. N. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 43 N. C. App. 525, 259 S. E. 2d 336.

No. 79–6740. BULLINGTON *v.* MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 594 S. W. 2d 908.

No. 79–6853. WEBB *v.* WEBB. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 245 Ga. 650, 266 S. E. 2d 463.

No. 80–5060. CARTER *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 598 S. W. 2d 763.

No. 79–6624. ROSALES-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 617 F. 2d 1349.

No. 79–6777. STEAGALD *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 606 F. 2d 540 and 615 F. 2d 642.

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No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 617 F. 2d 537.

Certiorari Denied. (See also Nos. 79–1530, 79–1846, 79–1889, 79–1969, 79–1972, 79–2026, 79–6626, 79–6634, 79–6646, 79–6652, 79–6672, 79–6678, 79–6820, 79–6847, 79–6866, 79–6898, 80–80, 80–138, 80–5018, and 80–5079, *supra.*)

No. 79–1362. AMERICAN FIDELITY LIFE INSURANCE CO. ET AL. *v.* ALABAMA FARM BUREAU MUTUAL CASUALTY INSURANCE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 602.

No. 79–1376. PLISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 577.

No. 79–1389. REINE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 377 So. 2d 131.

No. 79–1406. CITY OF LOS ANGELES *v.* GREATER WESTCHESTER HOMEOWNERS ASSN. ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 86, 603 P. 2d 1329.

No. 79–1410. DUPART ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 1226.

No. 79–1494. CLARK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 391.

No. 79–1522. POTASHNICK ET AL. *v.* PORT CITY CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1101.

No. 79–1534. BUTLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1372.

No. 79–1544. MOORE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 588 S. W. 2d 396.

No. 79–1552. DEPARTMENT OF REVENUE OF ALABAMA ET AL. *v.* FOX, FORMERLY DBA CHEROKEE CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 178.

No. 79–1560. GARRETT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 1038.

No. 79–1570. SMITH *v.* COTTON BROTHERS BAKING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 738.

No. 79–1580. WOOTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–1586. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 644 F. 2d 683.

No. 79–1592. WEST *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 710.

No. 79–1595. SHARPE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 370 So. 2d 42.

No. 79–1599. SCM CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 707.

No. 79–1610. DROBENA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1095.

No. 79–1611. METZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 147.

No. 79–1628. RUBIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 968, 158 Cal. Rptr. 488.

No. 79–1635. SOUTH DAKOTA *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1190.

No. 79–1641. CARTER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 256.

No. 79–1643. BOSCO *v.* BECK, REGION II ADMINISTRATOR, U. S. ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 769.

No. 79–1646. WEST GULF MARITIME ASSN. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 59, 610 F. 2d 1001.

No. 79–1647. KOWALIK ET UX. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 690.

No. 79–1652. MILLER *v.* LANDRIEU, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 58, 610 F. 2d 1000.

No. 79–1653. WEARLY ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 662.

No. 79–1655. HEAVY LIFT SERVICES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1121.

No. 79–1661. KEARNEY-NATIONAL, INC. *v.* BURNDY CORP. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79–1667. HANNAHVILLE INDIAN COMMUNITY ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, 614 F. 2d 1273.

No. 79–1672. LEA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 426.

No. 79–1673. ACAVINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–1675. VICKNAIR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 372.

No. 79–1685. BREITNER ET AL. *v.* HARRIS, DBA RICHARD HARRIS BUILDERS. C. A. 6th Cir. Certiorari denied.

No. 79–1686. RILEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. cxxx.

No. 79–1687. KNIGHT ET AL. *v.* HEANEY, U. S. CIRCUIT JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1162.

No. 79–1688. MARCELLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1691. SUBAITANI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 39 Md. App. 768.

No. 79–1696. ARNOLD ET AL. *v.* ELK GROVE VILLAGE. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–1697. ROWAN DRILLING CO. ET AL. *v.* WINK. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 98.

No. 79–1704. GRCICH *v.* JOGODA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1353.

No. 79–1705. INDEPENDENT BANKERS ASSOCIATION OF AMERICA *v.* HEIMANN, COMPTROLLER OF THE CURRENCY, UNITED STATES DEPARTMENT OF THE TREASURY. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 431, 613 F. 2d 1164.

No. 79–1706. ANDREWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 618 F. 2d 646.

No. 79–1707. DACOSTA ET AL. *v.* DACOSTA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 487 Pa. 616, 410 A. 2d 782.

No. 79–1710. KONDRAT *v.* BYRON. Ct. App. Ohio, Lake County. Certiorari denied.

No. 79–1712. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO ET AL. *v.* REID BURTON CONSTRUCTION, INC. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 698.

No. 79–1717. WRITERS GUILD OF AMERICA, WEST, INC., ET AL. *v.* AMERICAN BROADCASTING COS., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 355.

No. 79–1721. CARLE FOUNDATION *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 1192.

No. 79–1724. YEH *v.* SYSTEM DEVELOPMENT CORP. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 778.

No. 79–1725. CITY OF BOCA RATON *v.* BOCA VILLAS CORP. ET AL.; and CITY OF BOCA RATON *v.* ARVIDA CORP. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 371 So. 2d 154 (first case); 371 So. 2d 160 (second case).

No. 79–1726. LEFKOWITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1313.

No. 79–1728. HOT SPRINGS COUNTY SCHOOL DISTRICT NUMBER ONE ET AL. *v.* WASHAKIE COUNTY SCHOOL DISTRICT NUMBER ONE ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 606 P. 2d 310.

No. 79–1727. DILLON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 892, 618 F. 2d 124.

No. 79–1729. MCBRIDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79–1730. COUNTY OF SANTA BARBARA *v.* COLLINS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–1731. STURGIS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 379 So. 2d 534.

No. 79–1736. DARNEILLE ET AL. *v.* CARO. C. A. 2d Cir. Certiorari denied.

No. 79–1737. OGLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 233.

No. 79–1741. WILSON ET AL. *v.* OMAHA INDIAN TRIBE ET AL.;

No. 79–1744. RGP, INC., ET AL. *v.* OMAHA INDIAN TRIBE ET AL.; and

No. 79–1779. IOWA ET AL. *v.* OMAHA INDIAN TRIBE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1153.

No. 79–1742. AMERICAN STERILIZER CO. *v.* SYBRON CORP. ET AL.; and

No. 79–1916. SYBRON CORP. ET AL. *v.* AMERICAN STERILIZER CO. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 890.

No. 79–1746. KILROY *v.* COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 225.

No. 79–1748. GENERAL COMMITTEE OF ADJUSTMENT, UNITED TRANSPORTATION UNION E *v.* BURLINGTON NORTHERN, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 161.

No. 79–1752. ADAMS ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 1277.

No. 79–1753. CONWAY ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 397 So. 2d 1095.

No. 79–1755. GULLO *v.* LAMBERT ET AL. Cir. Ct. Arlington County, Va. Certiorari denied.

No. 79–1756. KEENAN MOTORS, INC. *v.* A. R. D. CORP. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 287.

No. 79–1759. ELIASON CORP. *v.* NATIONAL SANITATION FOUNDATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 126.

No. 79–1761. SEAY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 44 N. C. App. 301, 260 S. E. 2d 786.

No. 79–1762. TOWER LOAN OF MISSISSIPPI, INC. *v.* HARRIS. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 120.

No. 79–1763. CHLORINE INSTITUTE, INC., ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 120.

No. 79–1765. ARTHUR ANDERSEN & CO. *v.* STEWART ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 614 F. 2d 11.

No. 79–1768. MYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 230.

No. 79–1767. WILMINGTON UNITED NEIGHBORHOODS ET AL. *v.* U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 112.

No. 79–1769. SANDERS *v.* OLIVER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 804.

No. 79–1770. SWINEHART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 853.

No. 79–1771. TRIO PROCESS CORP. ET AL. *v.* L. GOLDSTEIN'S SONS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 1353.

No. 79–1774. LOOK *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 379 Mass. 893, 402 N. E. 2d 470.

No. 79–1775. KONDRAT *v.* MITROVICH ET AL. Ct. App. Ohio, Lake County. Certiorari denied.

No. 79–1778. FLISK, RECEIVER *v.* PEOPLES GAS LIGHT & COKE CO. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 79–1781. MOREJON-PACHECO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 1296.

No. 79–1782. SHOEMAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–1783. SMITH *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79–1785. NORTHERN NATURAL GAS CO. *v.* PREMIER RESOURCES, LTD. C. A. 10th Cir. Certiorari denied. Reported below: 616 F. 2d 1171.

No. 79–1786. SHAFFER *v.* BOND. Ct. App. Okla. Certiorari denied.

No. 79–1788. JUSTAK *v.* BOCHNOWSKI ET AL. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 391 N. E. 2d 872.

No. 79–1790. WATSON ET UX. *v.* COLLEX, INC. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1355.

No. 79–1792. MCALESTER CORP., DBA ALRIDGE HOTEL, ET AL. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied.

No. 79–1793. HARRISON *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 573.

No. 79–1797. DONOVAN WIRE & IRON CO. *v.* WHEELING-PITTSBURGH STEEL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 614 F. 2d 945.

No. 79–1799. LAUFGAS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–1801. LIBBEY-OWENS-FORD CO. *v.* EIRHART ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 616 F. 2d 278.

No. 79–1803. GREEN ET AL. *v.* LOUISIANA; and
No. 79–2045. DUPUIS ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 378 So. 2d 934.

No. 79–1804. GARCIA-JARAMILLO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1236.

No. 79–1807. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1361.

No. 79–1806. Bisso Towboat Co. *v.* Bazile. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 101.

No. 79–1808. Bonfoey *v.* Equitable Life Assurance Society of the United States. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 816.

No. 79–1811. Doe et al. *v.* Irwin et al. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1162.

No. 79–1813. Webb et al. *v.* United States; and
No. 79–6782. Johns *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 672.

No. 79–1815. Salob *v.* Ambach, Commissioner of Education of New York, et al. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 756, 423 N. Y. S. 2d 305.

No. 79–1817. Nelipowitz *v.* Christo et al. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1289.

No. 79–1818. Beacon National Insurance Co. et al. *v.* Texas State Board of Insurance et al. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 582 S. W. 2d 616.

No. 79–1821. Kesler *v.* Indiana Supreme Court Disciplinary Commission. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 397 N. E. 2d 574.

No. 79–1823. Northfield Cheese Co. *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 289.

No. 79–1824. Mallow et al. *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 79–1828. Pavilonis *v.* King, Governor of Massachusetts, et al.; and Pavilonis *v.* Secretary of Education. C. A. 1st Cir. Certiorari denied.

No. 79–1831. HECKER *v.* TOWNSHIP OF DOVER. Super. Ct. N. J. Certiorari denied.

No. 79–1833. AKRON, CANTON & YOUNGSTOWN RAILROAD CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 1162.

No. 79–1836. FOWLER ET UX. *v.* GENERAL DEVELOPMENT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 98.

No. 79–1837. ROBINSON *v.* GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 209, 420 N. Y. S. 2d 430.

No. 79–1839. FAZIO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1066.

No. 79–1842. D. J. MCDUFFIE, INC., ET AL. *v.* OLD RELIABLE FIRE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 145.

No. 79–1843. MASON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 222 Ct. Cl. 436, 615 F. 2d 1343.

No. 79–1844. DEPARTMENT OF NATURAL RESOURCES OF WASHINGTON ET AL. *v.* THURSTON COUNTY ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 656, 601 P. 2d 494.

No. 79–1845. CASTAGNA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 1026.

No. 79–1847. MASON *v.* MCDOWELL. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 770.

No. 79–1848. RETAIL STORE EMPLOYEES UNION, LOCAL No. 919, ET AL. *v.* UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–1849. RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., ET AL. *v.* NEW YORK STATE TAX COMMISSION ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 978, 421 N. Y. S. 2d 752.

No. 79–1850. MARTEN ET AL. *v.* THIES, DIRECTOR, SAN BERNARDINO COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 99 Cal. App. 3d 161, 160 Cal. Rptr. 57.

No. 79–1851. BARNDT *v.* WISSAHICKON SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1352.

No. 79–1854. LANGE ET AL. *v.* NATURE CONSERVANCY, INC., ET AL. Ct. App. Wash. Certiorari denied. Reported below: 24 Wash. App. 416, 601 P. 2d 963.

No. 79–1855. EASTALCO ALUMINUM CO. *v.* PUBLIC SERVICE COMMISSION OF MARYLAND ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 754.

No. 79–1858. CASTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1111.

No. 79–1859. GREYHOUND CORP. ET AL. *v.* MT. HOOD STAGES, INC., DBA PACIFIC TRAILWAYS. C. A. 9th Cir. Certioari denied. Reported below: 616 F. 2d 394.

No. 79–1860. GOINGS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–1861. EPP ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–1864. FIUMARA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–1866. SKALICKY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1117.

No. 79–1867. JONES *v.* ALEXANDER, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 778.

No. 79–1868. POTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 384.

No. 79–1869. S & M MATERIALS CO. *v.* SOUTHERN STONE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 198.

No. 79–1871. CASTILLO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 769.

No. 79–1872. HOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–1873. HERTHEL *v.* UNITED STATES;
No. 79–6673. HOLT *v.* UNITED STATES;
No. 79–6674. JOHNSON *v.* UNITED STATES; and
No. 79–6688. AHLBRAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–1875. ENERGY CONSUMERS & PRODUCERS ASSN., INC. *v.* DEPARTMENT OF ENERGY. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 632 F. 2d 129.

No. 79–1876. BLAKE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 731.

No. 79–1877. UNION OIL COMPANY OF CALIFORNIA *v.* EVANSON ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 619 F. 2d 72.

No. 79–1879. BOHACK CORP. *v.* IOWA BEEF PROCESSORS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 777.

No. 79–1882. BOYLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 359.

No. 79–1884. WISCONSIN ET AL. *v.* REESE, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 963.

No 79–1885. LAW ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 775.

No. 79–1888. ORION RESEARCH INC. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 551.

No. 79–1893. FREEDOM INSTITUTE OF AMERICA ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–1894. PAGNIELLO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–1897. G. G. S., INC. *v.* LINOLEX SYSTEMS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 110.

No. 79–1898. L'HOSTE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 796.

No. 79–1899. LOUISIANA *v.* MENNE. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 14.

No. 79–1900. FREEMAN *v.* O'NEAL STEEL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1123.

No. 79–1902. ROSENBAUM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79–1903. BEELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–1905. SEA ISLAND BROADCASTING CORPORATION OF SOUTH CAROLINA *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 187, 627 F. 2d 240.

No. 79–1906. MAYOR OF BALTIMORE ET AL. *v.* BARGER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 616 F. 2d 730.

No. 79–1911. RUTH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 276 Pa. Super. 631, 424 A. 2d 544.

No. 79–1912. FULTZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 204.

No. 79–1914. HARBOUR *v.* HARBOUR. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 590 S. W. 2d 828.

No. 79–1915. CITY OF CLEVELAND *v.* KRUPANSKY, U. S. DISTRICT JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 619 F. 2d 572 and 576.

No. 79–1917. CHAPLAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 621 F. 2d 1272.

No. 79–1919. HUWALDT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 79–1921. TREASURER, PRINCE GEORGE'S COUNTY, MARYLAND *v.* WASHINGTON NATIONAL ARENA LIMITED PARTNERSHIP ET AL. Ct. App. Md. Certiorari denied. Reported below: 287 Md. 38, 410 A. 2d 1060.

No. 79–1923. AGAPITO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 324.

No. 79–1924. INDEPENDENT ORDER OF FORESTERS *v.* BIER ET AL. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 79–1925. MOUNTAINEER EXCAVATING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 102.

No. 79–1926. UNION CAMP CORP. *v.* SEABOARD COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 604.

No. 79–1927. FRANCIS *v.* UNITED STATES; and
No. 80–292. DELILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 939.

No. 79–1928. TULLY CORPORATION OF VIRGINIA *v.* WINTER, A MINOR BY WINTER. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79–1929. BANKS ET UX. *v.* PHILLIPS. Ct. App. N. C. Certiorari denied. Reported below: 43 N. C. App. 739, 260 S. E. 2d 97.

No. 79–1930. ALBERNAZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 1234.

No. 79–1931. SANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 215.

No. 79–1932. THORNTON *v.* EQUIFAX, INC. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 700.

No. 79–1933. WESLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1297.

No. 79–1934. DANIELS *v.* SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1367.

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No. 79–1935. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* BAILEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1385.

No. 79–1936. MARENO, A MINOR BY MARENO *v.* WALKER ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–1937. WALNUT PROPERTIES, INC. *v.* LONG BEACH CITY COUNCIL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 100 Cal. App. 3d 1018, 161 Cal. Rptr. 411.

No. 79–1940. U. S. CABLEVISION CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 341.

No. 79–1942. SHAFFER *v.* COOK, JUDGE. Sup. Ct. Okla. Certiorari denied.

No. 79–1945. RONCKETTI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

No. 79–1947. SCHAFFAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 860.

No. 79–1948. WINNEBAGO TRIBE OF NEBRASKA *v.* RAY, DISTRICT ENGINEER, UNITED STATES ARMY CORPS OF ENGINEERS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 2d 269.

No. 79–1949. KAIN *v.* S.S. VJAZMA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 577.

No. 79–1950. BERK, EXECUTRIX *v.* COUNTY OF LOS ANGELES ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 201, 605 P. 2d 381.

No. 79–1951. PUCKETT *v.* PAULDING COUNTY, GEORGIA, BY ITS BOARD OF COMMISSIONERS. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 439, 265 S. E. 2d 579.

No. 79–1954. THOMPSON *v.* J. S. YOUNG CO.; and THOMPSON *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310 (both cases).

No. 79–1955. HAYS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 79–1956. CLEAN LAND AIR WATER CORP. *v.* WASTE SYSTEMS, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–1957. PISEL ET UX. *v.* ITT CONTINENTAL BAKING CO. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 2d 142, 399 N. E. 2d 1243.

No. 79–1958. INDIANA REFRIGERATOR LINES, INC. *v.* WISCONSIN PACKING CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 441.

No. 79–1960. POWERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 622 F. 2d 317.

No. 79–1961. BEARCE, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 556.

No. 79–1962. MURRAY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 621 F. 2d 1163.

No. 79–1963. PRESIDIO BRIDGE CO. *v.* MUSKIE, SECRETARY OF STATE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 578.

No. 79–1965. COUNTY OF LOS ANGELES ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL; and

No. 80–72. MARSHALL, SECRETARY OF LABOR, ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 185, 631 F. 2d 767.

No. 79–1966. COLONIAL PENN INSURANCE CO. *v.* SHOCKLEY. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 233.

No. 79–1968. GORDON *v.* BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–1971. JACOBSEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79–1973. MOLLY MURPHY'S, INC., ET AL. *v.* MASTERS. C. A. 10th Cir. Certiorari denied.

No. 79–1974. LETTS INDUSTRIES, INC. *v.* WIERSEMA. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 112.

No. 79–1975. METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA *v.* BUCKLEY ET AL.;

No. 79–2001. BOWEN, GOVERNOR OF INDIANA, ET AL. *v.* BUCKLEY ET AL.;

No. 79–2067. METROPOLITAN SCHOOL DISTRICT OF LAWRENCE, WARREN AND WAYNE TOWNSHIPS, MARION COUNTY, INDIANA, ET AL. *v.* BUCKLEY ET AL.;

No 80–99. SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL. *v.* BUCKLEY ET AL.;

No. 80–115. HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA *v.* BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.; and

No. 80–129. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL. *v.* METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 637 F. 2d 1101.

No. 79–1976. RAYMER *v.* DOUBLEDAY & CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 241.

No. 79–1978. WEEREN ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 654, 607 P. 2d 1279.

No. 79–1979. GARRAHY, GOVERNOR OF RHODE ISLAND, ET AL. *v.* PALMIGIANO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 616 F. 2d 598.

No. 79–1980. THOMAS, DBA J & J EXXON, ET AL. *v.* CITY OF MARIETTA, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 485, 265 S. E. 2d 775.

No. 79–1981. ARRIGALE ET UX. *v.* INTERNATIONAL FIDELITY INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1353.

No. 79–1982. FULCHER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 121, 626 F. 2d 985.

No. 79–1983. LOCAL 13889, UNITED STEELWORKERS OF AMERICA *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 1229.

No. 79–1985. JOURDAIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 617 F. 2d 507.

No. 79–1986. APPLEMAN ET AL. *v.* BEACH, ASSESSOR OF BERNALILLO COUNTY, ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 94 N. M. 237, 608 P. 2d 1119.

No. 79–1987. YIAMOUYIANNIS *v.* CONSUMERS UNION OF THE UNITED STATES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 932.

No. 79–1990. ARCHER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 978, 406 N. E. 2d 804.

No. 79–1991. LOWENSCHUSS *v.* BLUHDORN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 18.

No. 79–1992. LAVELLE *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–1993. HORAK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 2d 767.

No. 79–1994. BALANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 618 F. 2d 624.

No. 79–1999. FRANKLIN PROPERTY CO., DBA HILTON INN *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 447.

No. 79–2000. COHEN V. PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 489 Pa. 167, 413 A. 2d 1066.

No. 79–2002. KONSKI ENGINEERS, P. C., ET AL. *v.* LEVITT, COMPTROLLER OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 850, 404 N. E. 2d 1337.

No. 79–2005. SHARROW *v.* HOLTZMAN. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79–2007. WILLIAMS *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 441.

No. 79–2008. SANTA FE LAND IMPROVEMENT CO. *v.* CITY OF BERKELEY ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 515, 606 P. 2d 362.

No. 79–2011. ELLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79–2012. GALLAGHER *v.* CHRYSLER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 167.

No. 79–2013. ANGRIST *v.* UNITED STATES; and
No. 79–2017. WEXLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 1218.

No. 79–2015. THOMAS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 436.

No. 79–2020. HAMMETT *v.* ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1295.

No. 79–2021. STRAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 617 F. 2d 571.

No. 79–2022. BUCHER ET AL. *v.* SHUMWAY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 572.

No. 79–2023. PATINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 79–2024. URBATEC *v.* YUMA COUNTY, ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1216.

No. 79–2025. STERRITT TRUCKING, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 79–2027. ANDERSON, LEGAL REPRESENTATIVE OF ANDERSON'S ESTATE, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 535.

No. 79–2029. HOEHLING *v.* UNIVERSAL CITY STUDIOS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 972.

No. 79–2031. INSURANCE COMPANY OF NORTH AMERICA *v.* POYNER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 618 F. 2d 1186.

No. 79–2035. ALLEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 380 So. 2d 313.

No. 79–2036. FARRI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 579.

No. 79–2037. MISSOURI *v.* NATIONAL ORGANIZATION FOR WOMEN, INC. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 1301.

No. 79–2038. KIMBROUGH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 78 Ill. App. 3d 1200, 406 N. E. 2d 1161.

No. 79–2039. CASASSA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 668, 404 N. E. 2d 1310.

No. 79–2042. BRONSTEIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1327.

No. 79–2043. WIGGINESS, INC., ET AL. *v.* FRUCHTMAN, COMMISSIONER, DEPARTMENT OF BUILDINGS OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79–2046. DAZET *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 378 So. 2d 1369.

No. 79–2047. SIMMONS *v.* IOWA ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 290 N. W. 2d 589.

No. 79–2048. DYKSTRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 595.

No. 79–2050. CHROME PLATE, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 990.

No. 79–2052. SMITH *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 190, 267 S. E. 2d 826.

No. 79–2053. SINN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 415.

No. 79–2055. MAZUR *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari before judgment denied.

No. 79–2057. POWELL *v.* NIGRO. C. A. D. C. Cir. Certiorari denied.

No. 79–2058. SILVERNAIL *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 25 Wash. App. 185, 605 P. 2d 1279.

No. 79–2061. ALSOBROOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 139.

No. 79–2063. MCILROY ET AL., EXECUTORS *v.* ARKANSAS ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 268 Ark. 227, 595 S. W. 2d 659.

No. 79–2069. BULGIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 472.

No. 79–2070. 0.086 ACRES OF LAND ET AL. *v.* DEPARTMENT OF TRANSPORTATION OF GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 118, 267 S. E. 2d 651.

No. 79–2071. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 918.

No. 79–2072. WILLIAMS ET UX. *v.* NEW YORK STATE HIGHER EDUCATION SERVICES CORP. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 216.

No. 79–2073. BEHLING ET AL. *v.* SCHMIDT ET AL., DBA BROWN DEER DEVELOPMENT CO. Sup. Ct. Wis. Certiorari denied. Reported below: 95 Wis. 2d 731, 291 N. W. 2d 581.

No. 79–2074. ALLEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 382 So. 2d 11.

No. 79–2075. WISE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–2076. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 618 F. 2d 1281.

No. 79–2077. NEW YORK WATER SERVICE CORP. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 706, 405 N. E. 2d 710.

No. 79–2079. BURGESS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–2081. INENDINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 79–2082. ANNICARO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 375 So. 2d 860.

No. 79–2083. UNITED STEELWORKERS OF AMERICA ET AL. *v.* HOMER D. BRONSON CO. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287.

No. 79–2084. SAN ANTONIO PORTLAND CEMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1148.

No. 79–6083. MCCOWAN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 226 Kan. 752, 602 P. 2d 1363.

No. 79–6236. GODDARD *v.* VAUGHN, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below 614 F. 2d 929.

No. 79–6267. DEWITT *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 286 N. W. 2d 379.

No. 79–6285. HUDSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 286 Md. 569, 409 A. 2d 692.

No. 79–6321. BROWN *v.* MITCHELL, WARDEN. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. lxviii.

No. 79–6322. MITCHELL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 593 S. W. 2d 280.

No. 79–6325. COOPER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79–6331. SAUNDERS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 401 A. 2d 629.

No. 79–6348. LOWERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79–6365. BLADES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 619 P. 2d 875.

No. 79–6372. WHITE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 1149.

No. 79–6373. RAGLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79–6380. INORIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79–6384. DEBENEDICTIS ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 370 So. 2d 37.

No. 79–6385. STALLINGS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 592 S. W. 2d 465.

No. 79–6387. COHEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 617 F. 2d 56.

No. 79-6396. FLYNN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 92 Wis. 2d 427, 285 N. W. 2d 710.

No. 79-6403. LAPA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-6407. GANEY *v.* EDWARDS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 507.

No. 79-6410. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79-6434. PHELPS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 338, 265 S. E. 2d 53.

No. 79-6447. HOLMES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 79-6448. MARSHALL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 372 So. 2d 477.

No. 79-6449. MONTIGUE *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 288 Ore. 359, 605 P. 2d 656.

No. 79-6453. MCGILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79-6454. STRUM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79-6456. PARTON *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 154.

No. 79-6458. JOHNSON *v.* CITY OF BIRMINGHAM, ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 79-6460. JORDAN, AKA ADAMS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 288 Ore. 391, 605 P. 2d 646.

No. 79–6467. WILLIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79–6472. JONES *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 945, 393 N. E. 2d 1372.

No. 79–6474. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 1330.

No. 79–6477. CLARK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 592 S. W. 2d 709.

No. 79–6481. FEISTMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 776.

No. 79–6482. BRITT ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 152 Ga. App. 695, 263 S. E. 2d 691.

No. 79–6484. CARO-CARVAJAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79–6499. EAKER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 19.

No. 79–6500. WARREN *v.* GOVERNMENT NATIONAL MORTGAGE ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 1229.

No. 79–6506. COVINO *v.* MORRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–6507. MARTINOVSKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 118.

No. 79–6515. MASTERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1117.

No. 79–6516. CADENA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1385.

No. 79–6517. DIAZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 387, 394 N. E. 2d 465.

No. 79–6520. GREEN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 390 N. E. 2d 1087.

No. 79–6521. MADRID *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 595 S. W. 2d 106.

No. 79–6522. ORTEGO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 382 So. 2d 921.

No. 79–6524. GENTRY *v.* SMITH, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 580.

No. 79–6525. CEBALLO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 626.

No. 79–6526. LATHAM *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 285.

No. 79–6529. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–6530. HARRIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–6533. HUANG *v.* ROSEN ET AL. Ct. App. D. C. Certiorari denied.

No. 79–6534. PUSTELNIK *v.* CANNONITO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–6535. WITHERS *v.* LEVINE, CORRECTION COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 158.

No. 79–6536. YOUNG *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 292, 412 A. 2d 798.

No. 79–6541. SMITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 636, 421 N. Y. S. 2d 144.

No. 79–6542. O'HERN *v.* CHICAGO TYPOGRAPHICAL UNION No. 16 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 559.

No. 79–6543. LEBLANC *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 1012.

No. 79–6544. SMITH *v.* COX, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79–6545. GORDON *v.* REDMAN, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–6548. HALL, ADMINISTRATRIX *v.* PARAMOUNT PICTURES CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 180, 607 F. 2d 494.

No. 79–6549. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 573.

No. 79–6550. MOSES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 180, 263 S. E. 2d 916.

No. 79–6552. ALI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–6553. MARS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 704.

No. 79–6554. LOPEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–6555. CLOUDY *v.* REARDON. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79–6556. CRAWFORD *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 602.

No. 79–6557. PHIPPS *v.* ROGERS, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 578.

No. 79–6559. BERRY *v.* ROBINSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 95.

No. 79–6560. GOW *v.* COUNTY OF DADE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 371 So. 2d 493.

No. 79–6561. LONG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 757.

No. 79–6562. KULWIEC *v.* AIR LINE PILOTS ASSN. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1288.

No. 79–6563. DAIGLE *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 79–6564. LARD *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–6565. PHILLIPS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 79–6566. FELTON *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–6568. SCOTT *v.* WARDEN, MARYLAND PENITENTIARY. Ct. Sp. App. Md. Certiorari denied.

No. 79–6569. CAREAGA *v.* JAMES, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 616 F. 2d 1062.

No. 79–6571. MUHAMMAD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–6573. BOAG *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 79–6575. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79–6577. AUZENNE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 626.

No. 79–6578. FARMER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 79–6579. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 288.

No. 79–6582. GABALDON *v.* ROMERO, WARDEN, ET AL.; and CORDOVA ET AL. *v.* ROMERO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 1267 (second case).

No. 79–6586. DANIELS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 2d 220, 400 N. E. 2d 399.

No. 79–6589. KING *v.* MORLEY, JUDGE. Sup. Ct. Ohio. Certiorari denied.

No. 79–6590. AMAR *v.* CALIFORNIA; and

No. 79–6591. AMAR *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–6593. HARMAN *v.* WARE, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1357.

No. 79–6595. WARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 622 F. 2d 298.

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No. 79–6597. LAVONTE *v.* HARBER ET UX. Ct. App. Ore. Certiorari denied.

No. 79–6600. BLACKMON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 183.

No. 79–6606. PRATT *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 486.

No. 79–6607. THOMAS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 2d 254, 400 N. E. 2d 897.

No. 79–6613. GRUZEN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 267 Ark. 380, 591 S. W. 2d 342.

No. 79–6616. HOFF *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 81 N. J. 401, 408 A. 2d 795.

No. 79–6617. LANE ET AL. *v.* AHUMADA. Sup. Ct. Miss. Certiorari denied. Reported below: 381 So. 2d 147.

No. 79–6620. MAXFILL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–6621. STEVENS *v.* KIRKPATRICK. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 100.

No. 79–6622. PURYEAR *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–6623. STEELMAN *v.* BRAY, SHERIFF. C. A. 10th Cir. Certiorari denied.

No. 79–6627. TARKOWSKI *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 112.

No. 79–6628. TARKOWSKI *v.* COUNTY OF LAKE ET AL. C. A. 7th Cir. Reported below: 618 F. 2d 114.

No. 79–6631. GLEASON *v.* WYSE, YOUTH CENTER SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 79–6632. AMATO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–6633. MATHIS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 242 Ga. 761, 251 S. E. 2d 305.

No. 79–6635. ROSS *v.* FAIRFAX COUNTY GOVERNMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 103.

No. 79–6638. YOUNG, AKA CLOUDY *v.* SYDOW, CAPTAIN, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 79–6640. RAHMAN, AKA MCGEE *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 79–6641. CORBETT *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 722.

No. 79–6642. MCKINLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1107, 395 N. E. 2d 1246.

No. 79–6643. FINKLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79–6644. CARTE *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 79–6645. JOHNSON *v.* NUNES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 79–6647. MCFARLAND *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 287 N. W. 2d 162.

No. 79–6649. COLOMBANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79-6650. SKIDMORE *v.* CONSOLIDATED RAIL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 157.

No. 79-6651. CALDWELL ET AL. *v.* HENDERSON, REGIONAL DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 79-6653. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79-6654. MCILVAIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-6655. HANSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 618 F. 2d 1261.

No. 79-6656. CORSANI *v.* SENA, JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 572.

No. 79-6657. MEJIA *v.* NEW YORK SHERATON HOTEL. C. A. 2d Cir. Certiorari denied.

No. 79-6658. NEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-6659. FAUST *v.* WATKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1356.

No. 79-6660. MONEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79-6661. OPACKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-6662. VARGAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 54.

No. 79-6664. ALFORD *v.* CENTRAL INTELLIGENCE AGENCY. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 348.

No. 79–6665. DiSANTO *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 8 Mass. App. 694, 397 N. E. 2d 672.

No. 79–6666. CIARCIA ET AL. *v.* THOMAS, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 79–6667. O'DILLON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 342, 265 S. E. 2d 18.

No. 79–6668. BIRT *v.* HOPPER, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 221, 265 S. E. 2d 276.

No. 79–6670. FORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–6671. GOODMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 587.

No. 79–6675. BOYD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 129.

No. 79–6676. SULLIVAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 294.

No. 79–6677. PAPPAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79–6679. McCALL *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–6680. LEBEDUN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79–6681. MORTON *v.* STYNCHCOMBE, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79–6683. POWELL *v.* BOOZER, ACTING REGIONAL ADMINISTRATOR, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 79–6684. THIEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 778.

No. 79–6685. ROE *v.* UNITED STATES ATTORNEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 980.

No. 79–6686. BOLDEN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 40.

No. 79–6687. TARKOWSKI *v.* ROBERT BARTLETT REALTY CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–6690. ROSADO ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 1179.

No. 79–6691. THOMPSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 594 S. W. 2d 456.

No. 79–6692. ROMERO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–6693. RIDEOUT *v.* UNITED STATES; and
No. 80–7. JABARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1319.

No. 79–6694. ESCALANTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1197.

No. 79–6695. CARTER *v.* THOMAS. C. A. 5th Cir. Certiorari denied.

No. 79–6696. HARBOLT *v.* DEPARTMENT OF STATE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 772.

No. 79–6697. ANDERSON *v.* MITCHELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 95.

No. 79–6698. FRAZIER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–6700. MONTGOMERY *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 127.

No. 79–6701. HOOK *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 285.

No. 79–6702. RAMOS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 1065, 423 N. Y. S. 2d 974.

No. 79–6703. CROOKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 620 F. 2d 313.

No. 79–6707. BOGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 991.

No. 79–6708. JOSEPH *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 572.

No. 79–6709. ALLISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 779.

No. 79–6710. O'BRIEN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–6711. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 761.

No. 79–6712. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 759.

No. 79–6713. JEFFERSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 379 So. 2d 1389.

No. 79–6714. HELTON *v.* MOORE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 603.

No. 79–6717. MCCORMICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79–6718. BIG DAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 79–6720. GAMINEE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79–6721. SHEEHY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 1234.

No. 79–6722. CERBO *v.* FAUVER, CORRECTIONS COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 714.

No. 79–6723. LONGORIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 66.

No. 79–6725. SILVA *v.* NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79–6726. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 238.

No. 79–6727. KULWIEC *v.* UNITED AIR LINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 574.

No. 79–6728. RODRIGUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 671, 422 N. Y. S. 2d 272.

No. 79–6729. WILLIAMS *v.* TALLAHASSEE MOTORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 689.

No. 79–6730. SCOTT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 592 S. W. 2d 644.

No. 79–6732. INGRAM *v.* UNITED STATES; and
No. 80–5077. PORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 79–6733. TILLER *v.* CARTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79–6734. LEE *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79–6735. LAYTON *v.* PHEND, REFORMATORY SUPERINTENDENT. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 79–6736. ENGLISH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 620 F. 2d 150.

No. 79–6737. HAWKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79–6738. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 2d 940.

No. 79–6739. KNOTT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 379 So. 2d 1064.

No. 79–6741. CARABALLO *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 79–6744. GARRETT *v.* HUTTO, CORRECTIONS DIRECTOR. Sup. Ct. Va. Certiorari denied.

No. 79–6746. EAKER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 100 Cal. App. 3d 1007, 161 Cal. Rptr. 417.

No. 79–6747. WHITE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 79–6750. HARRYMAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 870.

No. 79–6753. ROSS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 598 S. W. 2d 885.

No. 79–6754. AHMETI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 79–6755. SHABAZZ, AKA PHILLIPS *v.* WILLIAMS ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 608 P. 2d 1131.

No. 79–6756. LEBEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 1054.

No. 79–6757. RUCKER *v.* FICKAS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1108.

No. 79–6758. LUMBERT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–6759. LANTZY *v.* HOWARD. C. A. 3d Cir. Certiorari denied.

No. 79–6760. MIRELES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 79 Ill. App. 3d 173, 398 N. E. 2d 150.

No. 79–6762. BIB'LE *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 548, 606 P. 2d 733.

No. 79–6763. MOUTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1379.

No. 79–6764. DAY *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 94 N. M. 753, 617 P. 2d 142.

No. 79–6767. DAVIS *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 293.

No. 79–6768. CARTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 953, 424 N. Y. S. 2d 15.

No. 79–6769. LITTLE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 574, 266 S. E. 2d 265.

No. 79–6771. SCOTLAND *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 578.

No. 79–6772. CLUGSTON ET AL. *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 602.

No. 79–6773. ARTUSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 192.

No. 79–6774. YAGY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79–6775. RUDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 783.

No. 79–6776. ZAMORSKY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 287, 412 A. 2d 793.

No. 79–6778. BELTON *v.* PILVAX PRINTING CORP. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 830, 404 N. E. 2d 1335.

No. 79–6780. LEE *v.* WILLINS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 617 F. 2d 320.

No. 79–6783. PAYNE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 79–6784. CANADY *v.* UNITED STATES C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 694.

No. 79–6785. PRATER *v.* BROWN. C. A. 9th Cir. Certiorari denied.

No. 79–6786. WELLS *v.* SOUTHERN AIRWAYS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 107.

No. 79–6787. SANCHEZ-JARAMILLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 637 F. 2d 1094.

No. 79–6788. EASTON *v.* OREGON STATE BAR. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 99, 610 P. 2d 270.

No. 79–6789. SMALLWOOD *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 414 A. 2d 822.

No. 79–6790. ARTHUR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 488 Pa. 262, 412 A. 2d 498.

No. 79–6791. PARSLEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 401 N. E. 2d 1360.

No. 79–6792. TARKO *v.* BUCHANAN, DBA ARNOLD A. SEMLER, INC. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–6793. DAVIDSON *v.* WILKINSON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 1215.

No. 79–6795. DUTT *v.* ALABAMA STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1295.

No. 79–6796. NABORS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–6797. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1342.

No. 79–6800. WILLIAMS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 107.

No. 79–6802. WATTS *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 515.

No. 79–6803. PADGETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 783.

No. 79–6805. NAVARRO-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79–6807. PARISIE *v.* IRVING, DIRECTOR, ILLINOIS PRISONER REVIEW BOARD, ET AL. C. A. 7th Cir. Certiorari denied.

No. 79–6808. BOYD *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–6810. PIGGIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 486.

No. 79–6811. JAFFER *v.* DIEFFENDERFER, DADE COUNTY ELECTIONS SUPERVISOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 577.

No. 79–6812. MARTIN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 79–6813. HAMILTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79–6814. LUPO *v.* HENDERSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79–6815. AUSTIN *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 581.

No. 79–6816. VENTURA *v.* CUPP, PENITENTIARY SUPERINTENDENT. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 45; and 289 Ore. 135, 610 P. 2d 1232.

No. 79–6817. HERNANDEZ-ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 533.

No. 79–6818. SMITH *v.* ASSIGNMENT OFFICE OF MONTGOMERY COUNTY CIRCUIT COURT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 586.

No. 79–6819. RIGDON *v.* RUSSELL ANACONDA ALUMINUM CO. ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 381 So. 2d 983.

No. 79–6821. HORTON, AKA BYNUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 79–6822. PINSON *v.* MAYWEBB HOSIERY MILLS ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 380 So. 2d 244.

No. 79–6823. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 2d 927.

No. 79–6824. WILLIS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 224 Ct. Cl. 628, 650 F. 2d 287.

No. 79–6827. HOLLEY *v.* COUNTY OF LOS ANGELES, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 102 Cal. App. 3d 926, 162 Cal. Rptr. 636.

No. 79–6828. MAINS *v.* BUTTERWORTH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 619 F. 2d 83.

No. 79–6831. HUNTER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1296.

No. 79–6832. COLLINS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–6836. MURCHISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 2d 1322.

No. 79–6837. TARKOWSKI *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 79–6838. TARKOWSKI *v.* ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 79–6839. MOON *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 79–6840. RAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 79–6841. NEELEY *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 79 Ill. App. 3d 528, 398 N. E. 2d 988.

No. 79–6842. GARRETT *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–6843. HOUSE *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–6844. MENDOZA-BAUTISTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 118.

No. 79–6845. RIDDELL *v.* BRADLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79-6849. CARTER *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 809.

No. 79-6850. ORTIZ *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 285.

No. 79-6851. EYLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 1255.

No. 79-6852. KRZEMINSKI *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 121.

No. 79-6855. LEWIS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 79-6857. CROSBY *v.* UNITED STATES DEPARTMENT OF THE AIR FORCE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79-6859. SMITH *v.* DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1251.

No. 79-6861. MARATTY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 597 S. W. 2d 609.

No. 79-6863. ANTILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 648.

No. 79-6864. CARROLL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 402 N. E. 2d 1234.

No. 79-6865. CARTER *v.* ADMINISTRATIVE JUDGES OF THE SUPREME COURT OF NEW YORK, KINGS COUNTY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–6867. HUSLAGE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 79–6868. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 258.

No. 79–6869. DOWD *v.* CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1089.

No. 79–6871. MCINERNEY *v.* BERMAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 621 F. 2d 20.

No. 79–6874. BOWEN *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 79–6875. NUTTER *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 79–6877. FASANO *v.* HALL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 555.

No. 79–6878. COOPER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 403 N. E. 2d 826.

No. 79–6879. DOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 631 F. 2d 110.

No. 79–6880. ISAACS ET AL. *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 79–6881. ABU-BAKR, AKA KING *v.* COSTELLO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 79–6882. BUCHANAN *v.* NORRIS, JAILER. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 301.

No. 79–6883. RODRIGUEZ *v.* ROMERO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

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No. 79–6886. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 104.

No. 79–6889. BRINKLEY *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 45.

No. 79–6890. FORSBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79–6891. MCCRARY *v.* MEROLA, DISTRICT ATTORNEY OF BRONX COUNTY. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 205.

No. 79–6892. BRYAN *v.* BYRD ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–6893. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 79–6894. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 280.

No. 79–6895. PHILLIPS *v.* BROWN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 79–6897. HAMPEL *v.* MOTEL PROPERTIES, INC. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 507, 266 S. E. 2d 805.

No. 80–1. GREEN *v.* BARTHOLOMEW ET AL. C. A. 2d Cir. Certiorari denied.

No. 80–2. SMITH *v.* CHRYSLER CORP. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 80–3. KELLOGG MALL ASSOCIATES *v.* BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 227 Kan. 231, 607 P. 2d 1330.

No. 80–6. INTERNATIONAL LONGSHOREMEN'S ASSN., LOCAL 1402 *v.* MARSHALL, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 96.

No. 80–8. EVANS *v.* MATNEY. C. A. 10th Cir. Certiorari denied.

No. 80–9. ERATH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 80–10. BUTLER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 222 Ct. Cl. 598, 650 F. 2d 285.

No. 80–16. LAKESIDE POULTRY RANCH, INC., ET AL. *v.* WALLACE, DIRECTOR, DEPARTMENT OF FOOD AND AGRICULTURE OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 80–18. UNIVERSAL WASTE CONTROL ET AL. *v.* WESTERN WASTE SERVICE SYSTEMS. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1094.

No. 80–19. LEWIS ET AL. *v.* ANDERSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 778.

No. 80–22. ORGANIZZAZOINE NAVOBI ITALIANA (URUGUAY), S. A., ET AL. *v.* TRANS INTERNATIONAL AIRLINES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 80–23. SEELIG ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 207.

No. 80–24. CONTINENTAL TRAINING SERVICES, INC., ET AL. *v.* VENZARA. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 80–27. DEVOTO ET AL. *v.* PACIFIC FIDELITY LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1340.

No. 80–30. STALLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1284.

No. 80–31. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 80–48. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, MICHIGAN, ET AL. *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL.; and

No. 80–104. LULAC COUNCIL 11054 ET AL. *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 1143.

No. 80–33. SMITTY BAKER COAL CO., INC. *v.* UNITED MINE WORKERS OF AMERICA. C. A. 4th Cir. Certiorari denied. Reported below. 620 F. 2d 416.

No. 80–34. IVARY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 222 Ct. Cl. 617, 650 F. 2d 285.

No. 80–36. THOMPSON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 223 Ct. Cl. 643, 650 F. 2d 286.

No. 80–38. ALMEDA MALL, INC., ET AL. *v.* HOUSTON LIGHTING & POWER CO. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 343.

No. 80–40. BERNITSKY ET AL., T/A BERNITSKY BROTHERS COAL CO., SLOPE 2 *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 948.

No. 80–42. STROUTH *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–44. DUAL MANUFACTURING & ENGINEERING, INC., ET AL. *v.* BURRIS INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 660.

No. 80–46. PILOTTI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 846, 423 N. Y. S. 2d 358.

No. 80–47. McINTYRE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 381 So. 2d 408.

No. 80–52. BOARD OF EDUCATION OF BALTIMORE COUNTY *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 97.

No. 80–58. DREIER *v.* YANIK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 288.

No. 80–62. WEISMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 624 F. 2d 1118.

No. 80–63. RALEY'S, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 80–65. STEVENS *v.* OHIO. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 80–66. GOLDBERG *v.* WARDEN, ALLENWOOD FEDERAL PRISON CAMP. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 60.

No. 80–67. ELECTRICAL PRODUCTS DIVISION OF MIDLAND-ROSS CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 617 F. 2d 977.

No. 80–69. NEAL-COOPER GRAIN CO. *v.* INTERNATIONAL COMMODITIES EXPORT CORP. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 80–70. CAIRE *v.* STASSI, DBA JOHN A. STASSI REAL ESTATE. Sup. Ct. La. Certiorari denied. Reported below: 379 So. 2d 1056.

No. 80–71. HINSON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 80–73. AMERICAN HOME ASSURANCE CO. *v.* COMMERCIAL UNION ASSURANCE CO. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 379 So. 2d 757.

No. 80–79. EDWARDS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 1, 627 F. 2d 460.

No. 80–81. ORTEGA *v.* PEREZ. Sup. Ct. P. R. Certiorari denied.

No. 80–85. TAYLOR, SECRETARY OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA *v.* GOLDEN ISLES CONVALESCENT CENTER, INC., DBA HALLANDALE REHABILITATION CENTER, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1355.

No. 80–86. DUCK ET AL. *v.* HARLESS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 619 F. 2d 611.

No. 80–87. 3,218.9 ACRES IN WARREN COUNTY, PENNSYLVANIA, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 619 F. 2d 288.

No. 80–88. SANCHEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 384 So. 2d 1385.

No. 80–89. LEAK REPAIRS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 80–91. DICK *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied.

No. 80–92. ARTARIAN *v.* ARTAR. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 751.

No. 80–93. MACFARLANE *v.* BERTLING ET UX. Ct. App. Ore. Certiorari denied. Reported below: 45 Ore. App. 1, 607 P. 2d 232.

No. 80–96. SAVOY FAUCET CO., INC., DBA SAVOY BRASS MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 80–101. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 93 Wash. 2d 329, 610 P. 2d 869.

No. 80–102. MADSEN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 125 Ariz. 346, 609 P. 2d 1046.

No. 80–109. ESTATE OF SHELTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1276.

No. 80–110. TAMARI ET AL., DBA WAHBE TAMARI & SONS CO. *v.* BACHE HALSEY STUART, INC., FORMERLY BACHE & CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 1196.

No. 80–112. MCKNIGHT *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 199 Colo. 313, 607 P. 2d 1007.

No. 80–113. SCHERER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 80–114. WILHELM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 80–119. GILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 623 F. 2d 540.

No. 80–121. OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL–CIO *v.* MIDWEST STOCK EXCHANGE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 620 F. 2d 629.

No. 80–122. SPARKS *v.* WESTERN SHORE PUBLISHING CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 199 U. S. App. D. C. 10, 615 F. 2d 1369.

No. 80–123. GLASER, DIRECTOR, DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY *v.* SALORIO ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 482, 414 A. 2d 943.

No. 80–124. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 294.

No. 80–127. TEXAS *v.* FAULDER. Ct. Crim. App. Tex. Certiorari denied. Reported below: 611 S. W. 2d 630.

No. 80–130. WALLS *v.* DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT. Ct. App. D. C. Certiorari denied.

No. 80–131. CARRICARTE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 384 So. 2d 1261.

No. 80–134. BOARD OF EDUCATION OF THE ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL DISTRICT ET AL. *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 986, 406 N. E. 2d 1061.

No. 80–136. CHOCALLO, ADMINISTRATIVE LAW JUDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290 and 622 F. 2d 578.

No. 80–139. PENNSYLVANIA PIPELINE, INC. *v.* NORTHERN CALIFORNIA DISTRICT COUNCIL OF HOD CARRIERS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 103 Cal. App. 3d 163, 162 Cal. Rptr. 851.

No. 80–140. M. G. R. S., INC. *v.* CALIFORNIA STATE BOARD OF EQUALIZATION. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–141. KELLEY MANUFACTURING CO. *v.* LILLISTON CORP. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 100.

No. 80–143. DETWEILER *v.* DETWEILER. Super. Ct. Pa. Certiorari denied. Reported below: 278 Pa. Super. 632, 425 A. 2d 12.

No. 80–149. MISCELLANEOUS DRIVERS & HELPERS UNION, LOCAL 610 *v.* PULITZER PUBLISHING CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 618 F. 2d 1275.

No. 80–150. HARTFORD ACCIDENT & INDEMNITY CO. *v.* MILES. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 590 S. W. 2d 223.

No. 80–152. BOCRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 623 F. 2d 281.

No. 80–160. RUSECKAS *v.* GUNSTEN, T/A GUNSTEN AGENCY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 586.

No. 80–165. MAISLIN TRANSPORT OF DELAWARE ET AL. *v.* FARRELL LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 619.

No. 80–168. HUTCHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 1083.

No. 80–179. AUTRY ET AL. *v.* FLORES ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1386.

No. 80–181. GORE ET AL. *v.* WOCHNER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 183.

No. 80–187. RUSH *v.* BAYFRONT MEDICAL CENTER, INC. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 294.

No. 80–188. KONSCOL *v.* GEORGIA EX REL. KONSCOL. Sup. Ct. Ga. Certiorari denied.

No. 80–198. BOUCHER *v.* CITY OF HAVRE, MONTANA, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 609 P. 2d 275.

No. 80–209. GELMAN ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 357, 631 F. 2d 939.

No. 80–211. JOHNSTON *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 80–230. OHIO SUBURBAN WATER CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 2d 17, 402 N. E. 2d 539.

No. 80–232. MARCHESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 80–234. ADKINSON *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 611 P. 2d 528.

No. 80–250. CRAMER *v.* METROPOLITAN FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–268. MCCURRY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–271. RATLIFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 623 F. 2d 1293.

No. 80–294. GREENE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 75.

No. 80–5001. ROHNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 82.

No. 80–5002. WOOD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 596 S. W. 2d 394.

No. 80–5003. JONES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 274 Pa. Super. 162, 418 A. 2d 346.

No. 80–5005. YANEZ *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 619 F. 2d 851.

No. 80–5007. MOBLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–5009. ZILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 562.

No. 80–5012. LEWIS ET AL. *v.* LEWIS ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 271 Pa. Super. 519, 414 A. 2d 375.

No. 80–5013. COOKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5015. BROWN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. lxviii.

No. 80–5016. KEY *v.* BOARD OF VOTER REGISTRATION OF CHARLESTON COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 88.

No. 80–5017. WILLIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 433, 163 Cal. Rptr. 718.

No. 80–5020. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 80–5021. WOODS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 844.

No. 80–5024. TALAMANTE *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 620 F. 2d 784.

No. 80–5026. WASSERBERGER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 980, 406 N. E. 2d 805.

No. 80–5027. FERRIS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO, ET AL. (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5029. JAUDON *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80–5031. INGRAM *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 584.

No. 80–5034. BROWN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 1057.

No. 80–5035. GALLAGHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 620 F. 2d 797.

No. 80–5036. PETERSON *v.* BARKSDALE, SHERIFF, ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–5038. ALLEN *v.* HILTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5039. LIVINGSTON *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5040. LEE *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 80–5041. JONES *v.* YOUNG ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5044. GREENWOOD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–5045. PINCIARO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80–5046. DANZEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 286.

No. 80–5047. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 80–5051. NEWBOLD *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 46.

No. 80–5052. GULLICK *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 120 N. H. 99, 411 A. 2d 1113.

No. 80–5054. BASZNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1101.

No. 80–5056. GREENE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 80–5059. WEDRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 192.

No. 80–5062. NEAL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 383 So. 2d 507.

No. 80–5063. DIETRICH *v.* LIMBS, UNITED STATES MARSHAL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 190.

No. 80–5064. GREEN *v.* ARMSTRONG RUBBER CO. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 967.

No. 80–5066. CLAYTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 2d 45, 402 N. E. 2d 1189.

No. 80–5068. ROBERTS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 2d 170, 405 N. E. 2d 247.

No. 80–5070. SHIRLEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 616, 266 S. E. 2d 218.

No. 80–5075. MELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–5076. RIDDELL *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 80–5081. SANDOVAL *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 80–5082. TILLI *v.* CAPABIANCO ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5086. VANDERDOES *v.* ST. CLAUDE GENERAL HOSPITAL OF NEW ORLEANS, LTD. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 378 So. 2d 207.

No. 80–5087. VANDERDOES *v.* OCHSNER CLINIC ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 377 So. 2d 1368.

No. 80–5088. GOODLEY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 80–5090. SEALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1101.

No. 80–5091. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 709.

No. 80–5092. KING *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 9 Mass. App. 892, 403 N. E. 2d 142.

No. 80–5094. ALFORD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–5095. PRAZAK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 623 F. 2d 152.

No. 80–5097. BURNETT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 668.

No. 80–5100. CARTERA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. lxxii.

No. 80–5102. WINKLE *v.* GRAND NATIONAL BANK. Sup. Ct. Ark. Certiorari denied. Reported below: 267 Ark. 123, 601 S. W. 2d 559.

No. 80–5105. SORRELLS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 80–5107. FLORES *v.* ONION ET AL., JUDGES. C. A. 5th Cir. Certiorari denied.

No. 80–5109. TARKOWSKI *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 80–5111. ARANDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5114. LOYD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 398 N. E. 2d 1260.

No. 80–5120. BOSTIC *v.* DURHAM COUNTY SUPERIOR COURT. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 95.

No. 80–5121. MOORE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 80 Ill. App. 3d 995, 400 N. E. 2d 525.

No. 80–5124. SHAW *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 223 Ct. Cl. 532, 622 F. 2d 520.

No. 80–5125. ALDRIDGE ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Clara. Certiorari denied.

No. 80–5126. FRANK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 80–5129. DOWNING *v.* EASTON HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 574.

No. 80–5130. NELSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–5131. WILSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–5133. MOLINARIO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 345.

No. 80–5135. MONTGOMERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 620 F. 2d 753.

No. 80–5138. BAKER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 403 N. E. 2d 1069.

No. 80–5140. ZAUN ET AL. *v.* CAPPARELLI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 80–5141. JOHNSON *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1360.

No. 80–5145. MCGUIRK *v.* FAIR ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 622 F. 2d 597.

No. 80–5147. COURTNEY *v.* BLAND, CORRECTIONS COMMISSIONER. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 301.

No. 80–5148. HOLLEY *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1099.

No. 80–5149. HARFLINGER *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 80–5152. WITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 283.

No. 80–5153. AGENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1088.

No. 80–5154. CROW ET AL. *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 600 S. W. 2d 162.

No. 80–5156. EZZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5157. CROOKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80–5159. BONDS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 43 N. C. App. 467, 259 S. E. 2d 377; and 45 N. C. App. 62, 262 S. E. 2d 340.

No. 80–5165. SMITH *v.* STRIKE FORCE, DEPARTMENT OF JUSTICE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–5166. LILLIBRIDGE, TRUSTEE, ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 80–5174. GALLAGHER *v.* CRIST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 594.

No. 80–5177. WADE *v.* FRANKLIN STRICKLIN LAND SURVEYORS, INC. Sup. Ct. Ark. Certiorari denied.

No. 80–5180. KUYKENDALL ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. cix.

No. 80–5182. CRENSHAW *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 274 S. C. 475, 266 S. E. 2d 61.

No. 80–5197. DEWEEVER *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied.

No. 80–5210. HICKS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–5211. THURMOND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1094.

No. 80–5218. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

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No. 80–5223. BERLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 2d 746.

No. 80–5233. NABKEY *v.* CITY OF GRAND RAPIDS ET AL. Ct. App. Mich. Certiorari denied.

No. 80–5247. HOLGUIN-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5250. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1105.

No. 80–5251. CHAUSSEE *v.* PUTMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 309.

No. 80–5257. DONKIS *v.* ROHRBAUGH ET AL. C. A. 4th Cir. Certiorari denied.

No. 80–5261. FIELDS *v.* COOK, JUDGE, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5270. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–5277. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80–5286. NAVA-RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1109.

No. 80–5289. TARGEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5290. RUSSELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1234. RICHARDSON ET AL. *v.* LOKEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 600 F. 2d 1265.

No. 79–1446. MICHIGAN *v.* HAMPTON. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 407 Mich. 354, 285 N. W. 2d 284.

No. 79–1829. MICHIGAN *v.* COMBS. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 79–1887. BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* STENSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 79–1891. ESTELLE, CORRECTIONS DIRECTOR *v.* PAPRSKAR. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 612 F. 2d 1003.

No. 80–28. WILMOT, CORRECTIONAL SUPERINTENDENT *v.* WALKER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 80–204. RYDER TRUCK LINES, INC. *v.* FARMER. Sup. Ct. Ga. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 245 Ga. 734, 266 S. E. 2d 922.

No. 80–257. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* SCOTT. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 617 F. 2d 99.

No. 79–1525. NAISBITT, EXECUTOR, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 611 F. 2d 1350.

No. 79–1838. RAISEN *v.* RAISEN ET AL. Sup. Ct. Fla. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 379 So. 2d 352.

No. 79–1870. ADULT BOOKMART, INC. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 152 Ga. App. 838, 264 S. E. 2d 273.

No. 79–1878. STANSBERRY, DBA UNIVERSAL STUDIO, ET AL. *v.* HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 613 F. 2d 1285.

No. 79–6835. HUNTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 77 Ill. App. 3d 1106, 402 N. E. 2d 443.

No. 80–5004. WHISENHUNT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 152 Ga. App. 829, 264 S. E. 2d 271.

No. 80–5118. ROSSER *v.* LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 438. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 616 F. 2d 221.

No. 80–5160. EVANS *v.* SOWDERS, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 620 F. 2d 302.

No. 79–1612. AMERICAN BROADCASTING COS., INC., ET AL. *v.* VEGOD CORP. ET AL. Sup. Ct. Cal. Motions of California Department of Consumer Affairs, National Association of Broadcasters, and Times Mirror Co. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 25 Cal. 3d 763, 603 P. 2d 14.

No. 79–1555. TENNESSEE *v.* BERRY. Sup. Ct. Tenn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 592 S. W. 2d 553.

No. 79–1574. BROWN ET AL. *v.* STONE ET AL. Sup. Ct. Miss. Certiorari denied. JUSTICE WHITE would dismiss the petition as moot. JUSTICE STEWART would grant certiorari. Reported below: 378 So. 2d 218.

No. 79–1656. PEREZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE STEWART would grant certiorari. Reported below: 610 F. 2d 1266.

No. 79–1708. NEW YORK *v.* S & E SHIPPING CORP. ET AL.;
No. 79–1716. S & E SHIPPING CORP. *v.* UNITED STATES ET AL.; and
No. 79–1718. SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* UNITED STATES ET AL. C. A. 2d Cir. Motion of Seaboard Allied Milling Corp. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 600 F. 2d 349.

No. 79–1732. HILTON, AKA MILTON, ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE POWELL would grant certiorari. Reported below: 619 F. 2d 127.

No. 79–1863. HARPER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE POWELL would grant certiorari. Reported below: 617 F. 2d 35.

No. 79–1750. FINGAR *v.* SEABOARD COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 606 F. 2d 648.

No. 79–1739. INUPIAT COMMUNITY OF THE ARCTIC SLOPE *v.* ATLANTIC RICHFIELD CO. ET AL.; and

No. 79–1743. UNITED STATES *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 612 F. 2d 1132.

No. 79–2080. MEAD CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 614 F. 2d 958.

No. 80–82. LEMONS ET AL. *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 228.

No. 79–1791. FLYNT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 153 Ga. App. 232, 264 S. E. 2d 669.

No. 79–1918. HAWKINS *v.* CITY OF BIRMINGHAM; and HOLDERFIELD *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the convictions. Reported below: 380 So. 2d 994 (first case); 380 So. 2d 990 (second case).

No. 79–6345. THOMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 613 F. 2d 787.

No. 79–1802. TOMLIN ET AL. *v.* WOODRUFF ET AL. C. A. 6th Cir. Motion of Tennessee Bar Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 616 F. 2d 924.

No. 80–5014. MAXWELL ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the convictions. Reported below: 152 Ga. App. 776, 264 S. E. 2d 254.

No. 79–1809. MOON *v.* ROADWAY EXPRESS, INC.; and
No. 79–1810. ROGERS *v.* FRITO-LAY, INC. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 611 F. 2d 1074.

No. 79–1816. METHODIST HOSPITAL OF KENTUCKY, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 619 F. 2d 563.

No. 79–1892. LAREDO COCA-COLA BOTTLING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 613 F. 2d 1338.

No. 79–1820. BADGER *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL would grant certiorari.

No. 79–1825. FEDERAL ENERGY REGULATORY COMMISSION *v.* PANHANDLE EASTERN PIPE LINE CO. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 198 U. S. App. D. C. 387, 613 F. 2d 1120.

No. 79–1883. WESTINGHOUSE ELECTRIC CORP. *v.* HUNTER ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 616 F. 2d 267.

No. 79–1946. MORAN *v.* GOULD CORP. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 612 F. 2d 728.

No. 80–43. TEMPLETON'S SERVICE, INC., ET AL. *v.* MOBIL OIL CORP. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 624 F. 2d 1084.

No. 79–1853. DURHAM DISTRIBUTORS, INC., ET AL. *v.* BOMBARDIER LTD. ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 605 F. 2d 1 and 615 F. 2d 575.

No. 79–6475. BROWN *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 612 F. 2d 1306.

No. 79–1857. ALCOA STEAMSHIP CO., INC. *v.* M/V NORDIC REGENT ET AL. C. A. 2d Cir. Motions of Association of Trial Lawyers of America, American Institute of Marine Underwriters, and National Industrial Traffic League for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 654 F. 2d 147.

No. 79–1874. STIPE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 620 F. 2d 237.

No. 79–1910. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* KAISER ALUMINUM & CHEMICAL CORP. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 615 F. 2d 470.

No. 79–1967. IMPERIAL DISTRIBUTORS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 617 F. 2d 892.

No. 79–2056. MILLER *v.* TEXAS STATE BOARD OF BARBER EXAMINERS. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 615 F. 2d 650.

No. 79–6570. HOLTAN *v.* NEBRASKA. Sup. Ct. Neb.;

No. 79–6580. HOUSTON *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 79–6585. STEVENS *v.* GEORGIA. Sup. Ct. Ga.;

No. 79–6619. ALDRIDGE *v.* FLORIDA. Sup. Ct. Fla.;

No. 79–6636. FITZPATRICK *v.* MONTANA. Sup. Ct. Mont.;

No. 79–6706. CAMPBELL *v.* ZANT, WARDEN. Sup. Ct. Ga.;

No. 79–6752. EVANS *v.* ARIZONA. Sup. Ct. Ariz.;

No. 79–6798. FITZPATRICK *v.* SENTENCE REVIEW DIVISION OF SUPREME COURT OF MONTANA. Sup. Ct. Mont.;

No. 79–6809. TUCKER *v.* GEORGIA. Sup. Ct. Ga.;

No. 79–6826. PREJEAN *v.* LOUISIANA. Sup. Ct. La.;

No. 79–6830. MCCLESKY *v.* GEORGIA. Sup. Ct. Ga.;

No. 79–6876. PIERRE *v.* MORRIS, WARDEN. Sup. Ct. Utah;

No. 79–6887. ANDREWS *v.* MORRIS, WARDEN. Sup. Ct. Utah;

No. 80–5042. ENGLISH *v.* TEXAS. Ct. Crim. App. Tex.;

No. 80–5080. PRESNELL *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County; and

No. 80–5113. WILLIAMS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: No. 79–6570, 205 Neb. 314, 287 N. W. 2d 671; No. 79–6580, 593 S. W. 2d 267; No. 79–6585, 245 Ga. 583, 266 S. E. 2d 194; No. 79–6636, — Mont. —, 606 P. 2d 1343; No. 79–6706, 245 Ga. 368, 265 S. E. 2d 22; No. 79–6752, 120 Ariz. 158, 584 P. 2d 1149, and

124 Ariz. 526, 606 P. 2d 16; No. 79–6809, 245 Ga. 68, 263 S. E. 2d 109; No. 79–6826, 379 So. 2d 240; No. 79–6830, 245 Ga. 108, 263 S. E. 2d 146; No. 79–6876, 607 P. 2d 812; No. 79–6887, 607 P. 2d 816; No. 80–5042, 592 S. W. 2d 949; No. 80–5113, 205 Neb. 56, 287 N. W. 2d 18.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79–6765. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 305.

No. 80–59. CARMI *v.* METROPOLITAN ST. LOUIS SEWER DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 672.

No. 79–6431. AHUMADA *v.* UNITED STATES;

No. 79–6609. MONROY *v.* UNITED STATES; and

No. 79–6705. OSPINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 614 F. 2d 61.

No. 79–6531. HALL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 385 So. 2d 757.

No. 79–6610. PRIESTER *v.* BANKER'S TRUST OF SOUTH CAROLINA, ADMINISTRATOR, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 618 F. 2d 103.

No. 79–6794. COLEMAN *v.* SENTENCE REVIEW DIVISION OF SUPREME COURT OF MONTANA. Sup. Ct. Mont. Stay of execution of sentence of death heretofore granted by JUSTICE MARSHALL on August 27, 1980, vacated. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 80–97. BURNS *v.* SULLIVAN ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari limited to Question 2 presented by the petition. Reported below: 619 F. 2d 99.

No. 80–5053. QUINONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 592 S. W. 2d 933.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 80–5110. ROSEE *v.* BOARD OF TRADE OF CITY OF CHICAGO ET AL. C. A. 7th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 618 F. 2d 114.

Rehearing Denied

No. 79–1600. BOMBARDIER LTD. ET AL. *v.* ENGINE SPECIALTIES, INC., 446 U. S. 983. Petition for rehearing denied.

October 14, 1980

Appeals Dismissed

No. 80–55. Mastrangelo *v.* Pennsylvania. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Justice Brennan and Justice Stevens would note probable jurisdiction and set case for oral argument. Reported below: 489 Pa. 254, 414 A. 2d 54.

No. 80–173. Barmat *v.* Robertson, Superintendent, Arizona Department of Liquor Licenses and Control, et al. Appeal from Ct. App. Ariz. dismissed for want of substantial federal question. Reported below: 125 Ariz. 514, 611 P. 2d 101.

No. 80–5212. Prenzler *v.* Pike et al. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5213. Prenzler *v.* Pike et al. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 79–1862. Globe Newspaper Co. *v.* Superior Court for the County of Norfolk. Appeal from Sup. Jud. Ct. Mass. Judgment vacated and case remanded for further consideration in light of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980). Reported below: 379 Mass. 846, 401 N. E. 2d 360.

Certiorari Granted—Vacated and Remanded

No. 80–183. Illinois *v.* Weber. App. Ct. Ill., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Salvucci*, 448 U. S. 83 (1980). Reported below: 80 Ill. App. 3d 1025, 400 N. E. 2d 926.

No. 80–5187. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum for the United States filed September 17, 1980. JUSTICE WHITE and JUSTICE REHNQUIST dissent. Reported below: 624 F. 2d 1092.

Miscellaneous Orders

No. A–230. HAYDEN *v.* FLORIDA. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–239. GLUCK *v.* GLUCK. Sup. Ct. Conn. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–251. WOOD *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–286. CALIFORNIA *v.* BRAESEKE. Sup. Ct. Cal. The stay heretofore entered by JUSTICE REHNQUIST is continued pending the timely filing and disposition of a petition for writ of certiorari.

No. A–303. MYERS ET AL. *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 2d Cir. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 78–1318. O'BANNON, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA *v.* TOWN COURT NURSING CENTER ET AL., 447 U. S. 773. Motion of respondent Town Court Nursing Center, Inc., to amend the judgment denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. D–188. IN RE DISBARMENT OF KESLER. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. 79–404. UNITED STATES *v.* CORTEZ ET AL. C. A. 9th Cir. [Certiorari granted, 447 U. S. 904.] Motion of respondents for divided argument granted.

No. 79–408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. [Certiorari granted, 445 U. S. 926.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted.

No. 79–824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79–827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, 445 U. S. 914.] Motion of the Solicitor General for divided argument granted. Motion of petitioners in No. 79–825 for divided argument denied.

No. 79–1157. ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS, ET AL. *v.* LASALLE NATIONAL BANK, TRUSTEE. C. A. 7th Cir. [Certiorari granted, 445 U. S. 925.] Motion of Cook County Legal Assistance Foundation ex rel. Fred Schubert for leave to file a brief as *amicus curiae* granted.

No. 79–1171. MINNESOTA *v.* CLOVER LEAF CREAMERY CO. ET AL. Sup. Ct. Minn. [Certiorari granted, 445 U. S. 949.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted.

No. 79–1420. FIRESTONE TIRE & RUBBER CO. *v.* RISJORD. C. A. 8th Cir. [Certiorari granted, 446 U. S. 934.] Motion of petitioner to supplement the record granted.

No. 79–1320. KASSEL, DIRECTOR OF TRANSPORTATION, ET AL. *v.* CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE. C. A. 8th Cir. [Probable jurisdiction noted, 446 U. S. 950.] Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted.

No. 79–1601. SUMNER, WARDEN *v.* MATA. C. A. 9th Cir. [Certiorari granted, 448 U. S. 910.] Motion of petitioner for divided argument denied.

No. 79–1631. DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA ET AL. *v.* WISCONSIN EX REL. LA FOLLETTE ET AL. Sup. Ct. Wis. [Probable jurisdiction noted, 448 U. S. 909.] Motion of the Democratic Conference for leave to file a brief as *amicus curiae* granted. Motion of appellees for divided argument granted. Request for additional time for oral argument denied.

No. 79–1764. TEXAS DEPARTMENT OF COMMUNITY AFFAIRS *v.* BURDINE. C. A. 5th Cir. [Certiorari granted, 447 U. S. 920.] Motion of Lonny F. Zweiner, Esquire, to permit Gregory Wilson, Esquire, to present oral argument *pro hac vice* on behalf of petitioner granted.

No. 80–5311. IN RE HERNANDEZ; and

No. 80–5312. IN RE HERNANDEZ. Petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 79–1640. SCHAD ET AL. *v.* BOROUGH OF MOUNT EPHRAIM. Appeal from Super. Ct. N. J., App. Div. Probable jurisdiction noted.

No. 80–195. METROMEDIA, INC., ET AL. *v.* CITY OF SAN DIEGO ET AL. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. Reported below: 26 Cal. 3d 848, 610 P. 2d 407.

Certiorari Granted

No. 79–1777. COMPLETE AUTO TRANSIT, INC., ET AL. *v.* REIS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 614 F. 2d 1110.

No. 80–169. UNITED PARCEL SERVICE, INC. *v.* MITCHELL ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 624 F. 2d 394.

No. 80–180. MCDANIEL ET AL. *v.* SANCHEZ ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 615 F. 2d 1023.

No. 79–1794. MICHIGAN *v.* SUMMERS. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 407 Mich. 432, 286 N. W. 2d 226.

No. 79–1997. CONNECTICUT BOARD OF PARDONS ET AL. *v.* DUMSCHAT ET AL. C. A. 2d Cir. Motion of respondents Brown and Czaja for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 618 F. 2d 216.

Certiorari Denied. (See also No. 80–5212, *supra.*)

No. 79–2030. BOSTICK ET AL. *v.* BOORSTIN, LIBRARIAN OF CONGRESS. C. A. D. C. Cir. Certiorari denied. Reported below: 199 U. S. App. D. C. 289, 617 F. 2d 871.

No. 79–2064. WALDBAUM *v.* FAIRCHILD PUBLICATIONS, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 301, 627 F. 2d 1287.

No. 79–6848. CARVER *v.* MCELROY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 565.

No. 79–6856. CHEERS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 463.

No. 80–17. BOWERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 80–35. WEINGARTEN *v.* BLOCK ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 102 Cal. App. 3d 129, 162 Cal. Rptr. 701.

No. 80–41. ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80–53. NORTH AMERICAN SOCCER LEAGUE ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1379.

No. 80–75. KECO INDUSTRIES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 443.

No. 80–78. PROVENZANO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 985.

No. 80–107. MENOMINEE TRIBE OF INDIANS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 223 Ct. Cl. 662, 650 F. 2d 286.

No. 80–111. BARR ET AL., ADMINISTRATORS *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 834, 425 N. Y. S. 2d 439.

No. 80–117. PATEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1358.

No. 80–153. HEADY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 80–155. AMSTAR CORP. *v.* DOMINO'S PIZZA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 252.

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No. 80–156. MASSACHUSETTS *v.* HUGHES. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 380 Mass. 583, 404 N. E. 2d 1239.

No. 80–162. TURNER *v.* RAYNES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 92.

No. 80–164. DANNING, TRUSTEE IN BANKRUPTCY *v.* PACIFIC PROPELLER, INC. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 731.

No. 80–166. COLBY *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 644.

No. 80–171. SAVE THE BAY, INC. *v.* UNITED STATES CORPS OF ENGINEERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 322.

No. 80–178. OGIONY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 617 F. 2d 14.

No. 80–186. WRIGHT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 400, 268 S. E. 2d 378.

No. 80–190. DIAMOND *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 292.

No. 80–194. RAMIREZ *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 80–197. WORLDWIDE CHURCH OF GOD, INC., ET AL. *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 80–200. MORSEY *v.* GREEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 917.

No. 80–205. Toso *v.* City of Santa Barbara. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 101 Cal. App. 3d 934, 162 Cal. Rptr. 210.

No. 80–206. Teague *v.* City of St. Louis, Missouri. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 773.

No. 80–210. Armstrong *v.* Maple Leaf Apartments, Ltd., et al. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 466.

No. 80–212. Mize et al. *v.* Securities and Exchange Commission. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1046.

No. 80–216. Kaufman *v.* New Jersey. Super. Ct. N. J. Certiorari denied.

No. 80–217. Howell *v.* Thomas, Sheriff. C. A. 5th Cir. Certiorari denied.

No. 80–220. Unidentified Remains of a Vessel *v.* Platoro Ltd., Inc. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1051.

No. 80–225. Love *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 275 S. C. 55, 271 S. E. 2d 110.

No. 80–229. Sellers et al. *v.* Rupert et al. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 881, 408 N. E. 2d 671.

No. 80–5033. Palmigiano *v.* Houle. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 877.

No. 80–5043. Harvey *v.* Sims. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 556, 265 S. E. 2d 879.

No. 80–5071. CALHOUN *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5078. NAVARRO *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 80–5085. ANDERSON *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–5104. HACKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 343.

No. 80–5128. FOREMAN *v.* BEE BINDERY, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 80–5144. WARREN *v.* HARVEY, ACTING DIRECTOR, WHITING FORENSIC INSTITUTE. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 925.

No. 80–5178. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 348.

No. 80–5183. HOWARD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 598 S. W. 2d 763.

No. 80–5192. RENFRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 569.

No. 80–5195. BEAL *v.* BEAL. Ct. App. Wash. Certiorari denied. Reported below: 24 Wash. App. 1030.

No. 80–5198. MCCRARY *v.* PETTIGRASS. C. A. 2d Cir. Certiorari denied.

No. 80–5201. SNEED *v.* HENSLEY, DETECTIVE, ASHEVILLE POLICE DEPARTMENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 80–5205. STEINKE *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 292 N. W. 2d 243.

No. 80–5206. COWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 112.

No. 80–5220. DISILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 203.

No. 80–5221. ANGELUCCI *v.* FITZGERALD, CORRECTIONS COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 202.

No. 80–5225. CAULEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 831, 425 N. Y. S. 2d 272.

No. 80–5234. BLEIER *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 308.

No. 80–5239. PENN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 647 F. 2d 876.

No. 80–5259. GODFREY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 383 So. 2d 575.

No. 80–5260. TURNER *v.* COUNTY OF SISKIYOU ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80–5262. NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80–5294. BERMAN *v.* BOARD OF REVIEW, NEW JERSEY DEPARTMENT OF LABOR AND INDUSTRY, ET AL. Super. Ct. N. J. Certiorari denied.

No. 80–5295. LUTHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5299. STONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 80–5301. HIGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 80–5313. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 630 F. 2d 566.

No. 80–5314. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–5318. VEZZANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5326. GRAHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 57.

No. 80–5329. KALSBECK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 625 F. 2d 123.

No. 80–5331. TAFERO *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 80–5332. SCHMIDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 616.

No. 80–5334. WERTZ ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 625 F. 2d 1128.

No. 80–5347. FLEMING *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 90, 270 S. E. 2d 185.

No. 80–5415. IN RE GREEN. C. A. D. C. Cir. Certiorari denied.

No. 80–5416. GREEN *v.* BEAVER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–1457. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, LOCAL 1969, ET AL. *v.* BISE ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 618 F. 2d 1299.

No. 79–1713. RED LAKE BAND OF CHIPPEWA INDIANS *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 614 F. 2d 1161.

No. 79–1920. SAFEWAY STORES, INC., ET AL. *v.* MEAT PRICE INVESTIGATORS ASSN. ET AL.;

No. 79–1959. MEAT PRICE INVESTIGATORS ASSN. ET AL. *v.* SAFEWAY STORES, INC., ET AL.;

No. 79–2060. BLACK ET AL. *v.* ALBERTSON'S, INC., ET AL.;

No. 80–103. LOWE ET AL. *v.* SAFEWAY STORES, INC., ET AL.; and

No. 80–105. AGEE ET AL. *v.* SAFEWAY STORES, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 600 F. 2d 1148.

No. 79–1988. EARTH SATELLITE CORP. ET AL. *v.* HASTINGS ET AL. C. A. D. C. Cir. Motion of respondent Hastings for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 202 U. S. App. D. C. 85, 628 F. 2d 85.

No. 80–237. OHIO *v.* YOUNG. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 62 Ohio St. 2d 370, 406 N. E. 2d 499.

No. 79–6512. HOLLOWAY *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 362 So. 2d 333.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court in this case denies certiorari to review what I believe is an important due process question requiring interpretation of our decisions in *Keeble* v. *United States*, 412 U. S. 205 (1973), and *Beck* v. *Alabama*, 447 U. S. 625 (1980).

The facts, taken from the state-court opinion and the undisputed allegations of the petition, may be summarized briefly. On November 7, 1972, a man was killed in Dade County, Fla. Five days later, petitioner voluntarily turned himself over to the Miami police in connection with the killing. After issuing *Miranda* warnings, the police took two separate statements from petitioner concerning the victim's death. Petitioner was then released. On November 29, he communicated with one of the police detectives and furnished a third statement.

About three and one-half years later, on June 23, 1976, petitioner and a codefendant were indicted for the capital felony of first-degree murder based on the 1972 killing. Following presentation of all the evidence, the trial court decided over petitioner's objection that it would not instruct the jury on the lesser included state offenses of second-degree murder, third-degree murder, and manslaughter, on the ground that the Florida statute of limitations had run on these lesser offenses.[1] The jury was instructed solely as to first-degree murder. Petitioner was convicted and sentenced to life imprisonment.

On appeal, the Florida District Court of Appeal affirmed the conviction. 362 So. 2d 333 (1978). The appellate court concluded that a defendant has no state or federal constitutional right to have a court instruct on lesser offenses where "any conviction returned as to such offense would be a nullity." *Id.*, at 335. After accepting jurisdiction and hearing argument, the Supreme Court of Florida, with one dissent, denied certiorari. 379 So. 2d 953 (1980).

This Court's decision in *Keeble* v. *United States*, *supra*, casts doubt on the validity of the state court's analysis. In *Keeble*, the Court held that an Indian charged with a federal

[1] At the time of the killing, the statute of limitations for each of the lesser offenses was two years. Fla. Stat. § 932.465 (1972). There was no period of limitations for the crime of first-degree murder. *Ibid.*

crime under the Major Crimes Act was entitled to an instruction on a lesser included offense even though the Act did not confer federal jurisdiction over the defendant for the lesser crime. The Court explained the value of such a safeguard:

> "[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (Emphasis in original). 412 U. S., at 212–213.

More recently, in *Beck* v. *Alabama*, *supra*, the Court held that the death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense if the jury has not been permitted to consider an alternative verdict of guilt of a lesser included offense. In reaffirming the Court's commitment to the lesser-offense doctrine, the Court observed that "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." 447 U. S., at 637.

Thus the Court more than once has expressed the understanding that a lesser-included-offense option minimizes the risk of undermining the reasonable-doubt standard. Florida, whose laws here apply, apparently has reached the same understanding, and requires that any person indicted for a "degree crime" such as first-degree murder [2] is entitled to

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[2] See Fla. Stat. § 782.04 (1976 and Supp. 1980) (defining murder as a degree crime).

have the jury instructed on all degrees of the offense.[3] It is not disputed that, absent the running of the statute of limitations, petitioner would have been so entitled in this case.

On the record presented, it appears that the State's own delay in bringing an indictment against petitioner may have caused the statute of limitations to run. Serious due process concerns are raised if the State through prosecutorial inaction can avoid its own mandate to instruct on lesser degrees of an offense. Assuming that petitioner's uncontested version of the facts is accurate, I believe such conduct merits plenary review.

Even if we were to find, upon a fuller development of the record, that the State bears no onus for the delay in securing an indictment, I am inclined to the view that petitioner retains his right to a lesser-offense instruction. The Court's decisions in both *Keeble* and *Beck* imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential factfinding function.[4] Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, *legal* matter with which the factfinder need have no concern.[5] Because I believe that a trial

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[3] Florida Rule of Criminal Procedure 3.490 reads as follows:

"*Determination of Degree of Offense* If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

[4] Both *Keeble* and *Beck* stop short of explicitly holding that a defendant is entitled to a lesser-included-offense instruction as a matter of due process. In the circumstances of those cases, however, such a holding was not necessary in order to prescribe the lesser-offense instruction.

[5] The legal question may be determined by whether the defendant himself chooses to invoke a statute of limitations defense. At least two Cir-

court's asserted lack of jurisdiction may not be dispositive of the due process concerns here invoked, I would grant the petition for certiorari.

No. 79–6583. MOOREFIELD *v.* UNITED STATES SECRET SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1021.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Because the decision in this case is subject to serious question under the reasoning of *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214 (1978), I dissent from the denial of certiorari.

The Secret Service maintains an open file on petitioner, who has twice been convicted of threatening to kill the President. In January 1976, petitioner filed an administrative request with the Service to inspect that file, or at least such portions of it as could be segregated from exempt portions.[1] There were at that time no proceedings pending against petitioner. His request was denied in its entirety.[2] This decision was

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cuits have held that a defendant can effectively waive this defense. *United States* v. *Wild*, 179 U. S. App. D. C. 232, 236–238, 551 F. 2d 418, 422–424, cert. denied, 431 U. S. 916 (1977); *United States* v. *Doyle*, 348 F. 2d 715, 718–719, and n. 3 (CA2), cert. denied, 382 U. S. 843 (1965) (waiver by guilty plea); *United States* v. *Parrino*, 212 F. 2d 919, 922 (CA2), cert. denied, 348 U. S. 840 (1954) (same). The court in *Wild*, in concluding that the statute of limitations constitutes an affirmative defense to be raised by the defendant rather than a jurisdictional bar to prosecution, relied heavily on this Court's prior statement to that effect in *United States* v. *Cook*, 17 Wall. 168, 179 (1872). See also *Biddinger* v. *Commissioner of Police*, 245 U. S. 128, 135 (1917). There is no indication in the record before us as to how petitioner acted in this regard, or even whether he was presented with a choice.

[1] The Court of Appeals recognized that Moorefield's convictions did not affect his right to see the file.

[2] The Secret Service cited seven Freedom of Information Act exemptions in refusing the original request. These exemptions appear in 5 U. S. C. §§ 552 (b)(2), (5), (7)(A, C–F).

upheld on administrative appeal and in subsequent judicial proceedings brought under the Freedom of Information Act, 5 U. S. C. § 552 (a)(4)(B). During the course of these proceedings, petitioner learned that the file he sought consisted of 225 pages. Despite a request by petitioner, at no time was this file itemized and indexed in such a way as to correlate particular portions of the file with particular exemption provisions of the Act.

The District Court conducted an *in camera* inspection of the file and then granted respondents' motion for summary judgment, finding that disclosure "would constitute a threat to ongoing enforcement activities and to certain individuals within [and] without the Secret Service." The Court of Appeals affirmed, 611 F. 2d 1021 (CA5 1980), relying on this Court's interpretation of Exemption 7 (A) of the Act, 5 U. S. C. § 552 (b)(7)(A), in *Robbins Tire*.

The Act requires that records and materials in the possession of federal agencies be made available on demand, unless the requested material falls within one of nine statutory exemptions. Exemption 7 (A) states: "This section does not apply to matters that are . . . (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . . ." The present language of this Exemption is the result of a 1974 amendment to the Act. The Act, prior to 1974, had exempted from disclosure all "investigatory files compiled for law enforcement purposes." 5 U. S. C. § 552 (b)(7) (1970 ed.). In *Robbins Tire* we surveyed the meaning and scope of Exemption 7 (A) in light of the legislative history that led to its narrowing in 1974. We concluded that the purpose of the 1974 amendment had been "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes . . . ." 437 U. S., at 236.

The Court of Appeals decision in this case creates a "blanket exemption" for any open Secret Service file. The court reached this result by means of a novel interpretation of the phrase "enforcement proceedings" and a questionable inference from *Robbins Tire*. First, the court interpreted "enforcement proceedings" to include more than adjudicatory procedures. It held that because Secret Service investigations are "directed toward an active and concrete effort to enforce the law," 611 F. 2d, at 1025, they qualify as "enforcement proceedings" under the Act. Second, *Robbins Tire* permits agencies to make "generic determinations" that disclosure of certain kinds of materials would interfere with enforcement proceedings. The Court of Appeals held that Secret Service files qualify as such a generic determination. Thus, any Secret Service file related to an open investigation is wholly exempted, without more, from disclosure.

The Court of Appeals thought that the prophylactic aim of the Secret Service distinguishes it from other law enforcement agencies that conduct "investigations with a view towards apprehending law-breakers and bringing them to justice." 611 F. 2d, at 1025. Clearly, however, other law enforcement agencies have prophylactic goals, and the acts the Secret Service investigates are crimes. See, *e. g.*, 18 U. S. C. § 871 (threats against the President are punishable by fine and imprisonment). If Secret Service investigations, without limitation, qualify as enforcement proceedings regardless of whether or not there is an adjudicatory proceeding pending or imminent, then arguably many investigatory files of other law enforcement agencies also qualify for exemption.

Robbins Tire concluded that a generic determination that disclosure of witness statements prior to unfair labor practice hearings would interfere with those proceedings was permissible under Exemption 7 (A). The decision of the Court of Appeals, however, did not make a generic determination with

respect to a kind of document, but rather with respect to a kind of investigatory file. Such a file could include various types of documents. This seems inconsistent with what the Court said in *Robbins Tire:*

> "by substituting the word 'records' for 'files,' [the 1974 amendment] would make clear that courts had to consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible 'commingling' by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential." 437 U. S., at 229–230.

Accordingly, I would issue the writ and give this case plenary consideration.

No. 80–157. E. R. SQUIBB & SONS, INC. *v.* SINDELL ET AL.;

No. 80–158. UPJOHN CO. *v.* SINDELL ET AL.;

No. 80–170. REXALL DRUG CO. ET AL. *v.* SINDELL ET AL.; and

No 80–172. ABBOTT LABORATORIES *v.* SINDELL ET AL. Sup. Ct. Cal. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 26 Cal. 3d 588, 607 P. 2d 924.

No. 80–175. WOODLANDS TELECOMMUNICATIONS CORP. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 615 F. 2d 1372.

No. 80–5208. VINSON *v.* RICHMOND POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 618 F. 2d 107.

No. 80–5235. FINNEY *v.* BALKCOM, WARDEN. Super. Ct. Ga., Tattnall County;

No. 80–5252. STEELMAN *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 80–5268. ANTONE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 80–5252, 120 Ariz. 301, 585 P. 2d 1213; No. 80–5268, 382 So. 2d 1205.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1694. HAMILTON *v.* GENERAL MOTORS CORP., 447 U. S. 907. Petition for rehearing denied.

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Dismissal Under Rule 53. (See No. 79–972, *infra.*)

Affirmed on Appeal

No. 80–215. EDWARDS ET AL. *v.* SERVICE MACHINE & SHIPBUILDING CORP., INC., ET AL. Affirmed on appeal from C. A. 5th Cir. Reported below: 617 F. 2d 70.

Appeals Dismissed

No. 80–116. DARRIGO *v.* STATE COMMISSION ON JUDICIAL CONDUCT ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE STEVENS would dismiss for want of substantial federal question. Reported below: 74 App. Div. 2d 801, 426 N. Y. S. 2d 1006.

No. 80–235. CRENSHAW *v.* BLANTON, GOVERNOR OF TENNESSEE, ET AL. Appeal from Ct. App. Tenn. dismissed for want of properly presented federal question. Reported below: 606 S. W. 2d 285.

No. 80–5173. CLAY, ADMINISTRATOR *v.* HALL ET AL. Appeal from Ct. App. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 597 S. W. 2d 737.

No. 80–5272. BROWN *v.* KANSAS WORKMEN'S COMPENSATION FUND. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 227 Kan. 645, 608 P. 2d 1356.

Certiorari Granted—Vacated and Remanded. (See also No. 79–1901, *ante*, p. 1.)

No. 79–1970. CICCONE *v.* TEXTRON, INC. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980). Reported below: 616 F. 2d 1216.

No. 79–1998. CALIFORNIA *v.* TERESINSKI. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Crews*, 445 U. S. 463 (1980). Reported below: 26 Cal. 3d 457, 605 P. 2d 874.

No. 80–208. EWALD *v.* GREAT ATLANTIC & PACIFIC TEA CO., INC. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980). Reported below: 620 F. 2d 1183.

No. 80–5275. BRACEWELL *v.* ALABAMA. Ct. Crim. App. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Beck* v. *Alabama*, 447 U. S. 625 (1980). Reported below: 401 So. 2d 125.

Certiorari Dismissed

No. 79–972. WESTVACO CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. [Certiorari granted, 447 U. S. 919.] Motion of respondents Owens-Illinois, Inc., et al. to dismiss the writ of certiorari granted. Motion of Westvaco Corp. to dismiss the writ of certiorari pursuant to Rule 53 granted. Motion of Mead Corp. for leave to intervene as a party petitioner denied. Certiorari dismissed. JUSTICE POWELL took no part in the consideration or decision of this case.

Vacated and Remanded After Certiorari Granted

No. 79–1356. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. [Certiorari granted, 448 U. S. 910.] Judgment vacated and case remanded for further consideration in light of the subsequent development described in the suggestion of mootness filed by respondents on October 2, 1980; the response of petitioners filed on October 10, 1980; the response of the United States as *amicus curiae* filed on October 10, 1980; and the reply filed on October 15, 1980.

Miscellaneous Orders

No. A–146 (80–5216). SCOTT *v.* FLORIDA. Application for stay of proceedings in the Supreme Court of Florida, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

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No. A–253 (80–552). California Manufacturers Assn. et al. *v.* Industrial Welfare Commission of California et al.; and

No. A–254 (80–560). San Joaquin Nisei Farmers League et al. *v.* Industrial Welfare Commission of California et al. Sup. Ct. Cal. The order entered by Justice Rehnquist on September 26, 1980, staying the issuance of a peremptory writ of mandate is vacated, and applications are denied.

No. A–322. Skeen et al. *v.* Hooper, Secretary of State of New Mexico. Application for injunction, presented to Justice White, and by him referred to the Court, denied.

No. A–333. Whig Party of Alabama et al. *v.* Siegelman, Secretary of State of Alabama, et al. C. A. 5th Cir. Application for injunction and other relief, presented to Justice Brennan, and by him referred to the Court, denied.

No. D–186. In re Disbarment of Cooper. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D–190. In re Disbarment of Fusciello. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D–191. In re Disbarment of Schilpp. Disbarment entered. [For earlier order herein, see 446 U. S. 933.]

No. D–194. In re Disbarment of Amos. Disbarment entered. [For earlier order herein, see 447 U. S. 902.]

No. 79–1388. Kirchberg *v.* Feenstra et al. C. A. 5th Cir. [Probable jurisdiction noted, 446 U. S. 917.] Suggestion of mootness filed by appellees Edwards and Louisiana rejected.

No. 80–83. Muskie, Secretary of State *v.* Agee. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 818.] Motion of respondent to expedite denied.

No. 80–255. GEORGIA POWER CO. *v.* 138.30 ACRES OF LAND ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–293. UNITEX LTD. ET AL. *v.* DAN RIVER, INC. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 80–5422. IN RE MAGEE; and

No. 80–5447. IN RE MOORE. Petitions for writs of habeas corpus denied.

Probable Jurisdiction Postponed

No. 80–5. MCCARTY *v.* MCCARTY. Appeal from Ct. App. Cal., 1st App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 79–1734. PARRATT ET AL. *v.* TAYLOR. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 620 F. 2d 307.

No. 79–1711. MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1754. JOINT MEETING OF ESSEX AND UNION COUNTIES *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1760. CITY OF NEW YORK ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.; and

No. 80–12. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL. C. A. 3d Cir. Certiorari granted limited to the following questions:

1. Whether the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. III), and the Marine Protection, Research, and Sanctuaries Act of 1972,

33 U. S. C. § 1401 *et seq.* (1976 ed. and Supp. III), imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U. S. C. § 1415 (g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U. S. C. § 1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act.

Cases consolidated and a total of one hour allotted for oral argument. Reported below: 616 F. 2d 1222.

Certiorari Denied. (See also Nos. 80–116 and 80–5173, *supra.*)

No. 79–1637. J. P. STEVENS & Co., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 881.

No. 79–1913. AACON AUTO TRANSPORT, INC. *v.* MILLER. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79–6724. SHAW *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below 598 S. W. 2d 883.

No. 79–6751. JACOBS *v.* ROWE, CORRECTIONS DIRECTOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 79–6833. KRAMARCZYK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 78 Ill. App. 3d 6, 396 N. E. 2d 1081.

No. 80–37. LESTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 101 Cal. App. 3d 613, 161 Cal. Rptr. 703.

No. 80–95. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 474.

No. 80–106. SAICI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 80–118. DAY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1122.

No. 80–128. INVESTORS RESEARCH CORP. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 168, 628 F. 2d 168.

No. 80–132. BERG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 1026.

No. 80–145. UNDERWOOD ET AL. *v.* SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 80–154. MOLES *v.* MORTON F. PLANT HOSPITAL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 293.

No. 80–199. BERKLEY MACHINE WORKS & FOUNDRY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 898.

No. 80–218. SHERWOOD *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 47.

No. 80–219. BIG BEAR SUPERMARKETS NO. 3 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 924.

No. 80–228. SUBURBAN REALTY CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 171.

No. 80–240. JONES ET AL. *v.* KNELLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 204.

No. 80–244. ALDRIDGE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 744, 266 S. E. 2d 513.

No. 80–247. TAMA MEAT PACKING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied.

No. 80–248. RUDOLF WOLFF & CO., LTD. *v.* NEIMAN, DBA LONDON GROUP (1974). C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 1189.

No. 80–249. SCHARA ET AL. *v.* ANACONDA CO. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 610 P. 2d 132.

No. 80–253. YANOWITZ *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 67 Ohio App. 2d 141, 426 N. E. 2d 190.

No. 80–260. MILESTONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 626 F. 2d 264.

No. 80–261. LAROCHELLE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 80–267. MANNING *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–269. CONNECTICUT *v.* GOLD. Sup. Ct. Conn. Certiorari denied. Reported below: 180 Conn. 619, 431 A. 2d 501.

No. 80–272. T. F. H. PUBLICATIONS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 579.

No. 80–279. RIEGEL TEXTILE CORP. *v.* GRYC, BY GRYC, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 297 N. W. 2d 727.

No. 80–282. YOW *v.* AMERICAN HOME ASSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 589.

No. 80–285. CHVOSTA *v.* PIERRE ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–287. SHEMITZ *v.* DEERE & CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 623 F. 2d 1180.

No. 80–288. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 80–303. RENFRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 497.

No. 80–312. BONO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–570. STROOM *v.* CIVILETTI, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 80–5037. GREER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 592 S. W. 2d 645.

No. 80–5050. JOHNS *v.* NANAWALE COMMUNITY ASSN. ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5069. MATA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 125 Ariz. 243, 609 P. 2d 58.

No. 80–5096. RAUB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1205.

No. 80–5117. ELLIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 488 Pa. 594, 413 A. 2d 384.

No. 80–5186. PATTERSON *v.* GARRINGTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 80–5203. PHILLIPS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5207. DAVIS *v.* STEPHENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1348.

No. 80–5244. QUIGG *v.* CRIST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1107.

No. 80–5264. MONTGOMERY *v.* NATIONAL MULTIPLE SCLEROSIS SOCIETY. C. A. D. C. Cir. Certiorari denied.

No. 80–5267. NORRIS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–5271. ROACH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–5292. CLARK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 416 A. 2d 717.

No. 80–5293. BOYD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5333. MAYES *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 850.

No. 80–5340. MEIER *v.* HUGHES TOOL CO. C. A. 10th Cir. Certiorari denied.

No. 80–5342. FORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 2d 807.

No. 80–5348. BARRETT *v.* U. S. CUSTOMS SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 291.

No. 80–5362. KLINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–5365. DEMARCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–5367. SACCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–5374. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 2d 162.

No. 80–5383. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 80–5386. YATES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1094.

No. 80–5389. BROWN, AKA DENNIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 80–5390. WADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80–5391. LAGATTUTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–5395. DEVLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5409. BENTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 587.

No. 80–5413. MIZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 866.

No. 80–5418. FORREST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1107.

No. 80–5438. WARGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–1545. AMSTAR CORP. *v.* SOUTHERN PACIFIC TRANSPORT COMPANY OF TEXAS AND LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1100.

JUSTICE BLACKMUN, dissenting.

It seems to me that the Court's denial of certiorari in this case utterly ignores the parties' intent in executing a consent to a judgment and in their subsequent actions pursuant thereto.

Petitioner is a sugar refiner. It filed suit under § 20 (11) of the Interstate Commerce Act, 24 Stat. 386, as amended, 49 U. S. C. § 20 (11),[1] against respondent, a common carrier by motor, for damage to a cargo of sugar respondent undertook to transport. Although respondent by its formal answer denied liability, the real issue in the litigation proved to be the amount for which respondent was liable. Petitioner-shipper took the position that, under *Gore Products, Inc.* v. *Texas & N. O. R. Co.*, 34 So. 2d 418 (La. App. 1948), the proper measure of damages was the profit lost by petitioner on the completed sale, or $7,529.28. Respondent-carrier, on the other hand, contended that the proper measure was the cost of reprocessing the sugar for resale to another customer, or $488.65.[2] Respondent moved for partial summary judgment only on the issue of the quantum of damages. Over

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[1] Section 20 (11) was repealed in 1978 by Pub. L. 95–473, § 4 (b), 92 Stat. 1466, but the Interstate Commerce Act was reenacted as positive law by the same statute. 92 Stat. 1337.

[2] The smaller amount is not in dispute. Respondent has not agreed that the larger amount is correct, but it states that it "has always assumed" that the profit lost on the completed sale of the sugar was in excess of the smaller amount. Brief in Opposition 2.

petitioner's objection, the United States District Court for the Eastern District of Louisiana granted that motion, leaving open, so far as that court was concerned, the issue of liability. The partial summary judgment, being interlocutory, of course was not then appealable. See 28 U. S. C. §§ 1291 and 1292.

After a pretrial conference, the parties by their counsel entered into a stipulation of facts, App. to Pet. for Cert. 29a, and submitted to the court a "Joint Motion for Approval of Consent Judgment." *Id.*, at 32a.[3] The District Court then entered its "Consent Judgment upon Joint Stipulation of Facts," *id.*, at 26a, the final paragraph of which recited:

> "This judgment is rendered in recognition of the reservation by the plaintiff of its right to prosecute an appeal in this action in connection with this judgment and in connection with the partial summary judgment rendered on March 14, 1979." *Id.*, at 27a.

The smaller of the two sums was then paid to petitioner. It thereupon executed a satisfaction of judgment, *id.*, at 34a, still reciting its reservation.[4]

Petitioner in due course appealed to the United States Court of Appeals for the Fifth Circuit. Both sides devoted their briefs in that court exclusively to the liability issue. The Court of Appeals, however, with a short *per curiam* opinion, held that, on the authority of another *per curiam* opin-

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[3] This Joint Motion recited:

"Amstar Corporation joins in this motion with full reservation of its right to prosecute an appeal in this action, both with respect to the attached consent judgment and with respect to the partial summary judgment granted in this action on March 14, 1979." App. to Pet. for Cert. 33a.

[4] The satisfaction provided:

"This Satisfaction of Judgment has been executed by Amstar Corporation with full reservation of its right to prosecute an appeal in this action in connection with the judgment entered on May 3, 1979, and in connection with the partial summary judgment rendered on March 14, 1979." *Id.*, at 34a.

ion, *White & Yarborough* v. *Dailey*, 228 F. 2d 836 (CA5 1955), (the governing authority of which I seriously question), "the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it." 607 F. 2d 1100 (1979).

It seems to me to be clear that any consent on the part of petitioner did not reach the disputed difference between $7,529.28 and $488.65. To the extent that the Court of Appeals' holding rests on the suggestion in *White & Yarborough* v. *Dailey*, 228 F. 2d, at 837, that an appeal will not lie when payment of the judgment has been accepted, that holding is inconsistent with *United States* v. *Hougham*, 364 U. S. 310 (1960), where this Court said:

> "It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." *Id.*, at 312.

Nor does the mere fact that the parties entered into a consent judgment preclude appeal. In *Swift & Co.* v. *United States*, 276 U. S. 311 (1928), it was observed:

> "The decree sought to be vacated was entered with the defendants' consent. Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. . . . In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered . . . ." *Id.*, at 323–324.

Here there is "a claim of lack of actual consent." See also *Nashville, C. & St. L. R. Co.* v. *United States*, 113 U. S. 261 (1885); *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289 (1880).

The Court of Appeals' opinion also seems to me to be in

some tension, if not outright conflict, on the point at issue, with *diLeo* v. *Greenfield*, 541 F. 2d 949, 952 (CA2 1976); *United States ex rel. H & S Industries, Inc.* v. *F. D. Rich Co.*, 525 F. 2d 760, 764–765 (CA7 1975); and *Gadsden* v. *Fripp*, 330 F. 2d 545, 548 (CA4 1964).

It may well be that upon review of the merits of the District Court's judgment, respondent will prevail. It seems to me, however, that petitioner is entitled to a ruling on the merits of its appeal to the Court of Appeals, and is not to be foreclosed by a strict concept of consent and acceptance in the face of facts that the asserted consent was specifically limited and that petitioner consistently and persistently disclaimed full settlement of the lawsuit. Indeed, until the case arrived here, respondent does not appear to have claimed otherwise.

The amount in contest is not large, but that fact in itself is no reason for this Court's lack of interest in a case where the principle is important. I would give serious consideration to a summary reversal of the judgment of the Court of Appeals. At the least, I would grant certiorari and set the case for argument.

No. 79–1735. JARRETT *v.* JARRETT. Sup. Ct. Ill. Certiorari denied. Reported below: 78 Ill. 2d 337, 400 N. E. 2d 421.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

This petition raises the significant question whether the State may deprive a divorced mother of the custody of her children through operation of a conclusive presumption that her cohabitation with an unmarried adult male constitutes custody not in the best interests of the children, however strong the contrary evidence. Because the decision below[1] conflicts with the import of relevant precedent of this Court, I dissent from the denial of a writ of certiorari.

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[1] 78 Ill. 2d 337, 400 N. E. 2d 421 (1979).

In December 1976, petitioner Jacqueline Jarrett was divorced from respondent Walter Jarrett. Jacqueline was given custody of their three daughters, then aged 12, 10, and 7. Jacqueline was also awarded use of the family home and child support; Walter had visitation rights, and the children regularly spent their weekends with him. In April 1977, Jacqueline told Walter that her friend, Wayne Hammon, was going to move into the family home. Walter objected and one week later filed a custody modification petition, seeking custody of his children on the grounds that he objected to his ex-wife's nonmarital relationship and did not wish his daughters to be raised in what he regarded to be an immoral atmosphere.

Following a hearing at which Jacqueline, Walter, and Hammon testified, the Circuit Court modified its original decree and granted custody of the children to Walter, finding the custody change necessary for the "moral and spiritual well-being and development" of the children. 78 Ill. 2d 337, 342, 400 N. E. 2d 421, 422 (1979). The Appellate Court reversed, reasoning that the Circuit Court made no finding and identified no evidence that Jacqueline was unfit to retain custody and, further, that there was no evidence that the change in custody was necessary to serve the best interests of the children.

A divided Illinois Supreme Court reversed the Appellate Court and reinstated the Circuit Court's modified custody decree. Applying the Illinois rule that a change in custody will be ordered only if necessary to serve the best interests of the child, the State Supreme Court found that Jacqueline's ostensible violation of the Illinois fornication statute [2] evinced a "disregard for existing standards of conduct [that] instructs her children, by example, that they, too, may ignore

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[2] Section 11–8 of the Criminal Code of 1961 provides that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." Ill. Rev. Stat., ch. 38, § 11–8 (1977).

them, and could well encourage the children to engage in similar activity in the future." *Id.*, at 346–347, 400 N. E. 2d, at 424 (citations omitted). The court, therefore, concluded that retention of custody by Jacqueline adversely affected the best interests of the children since there was a possibility of harm to them, even though it might become manifest only in the future, there being no showing of current actual harm.[3] *Stanley* v. *Illinois*, 405 U. S. 645 (1972), was distinguished on the ground that *Stanley* invalidated a conclusive presumption that an unwed father is unfit to exercise custody over his children, whereas the conclusion in the instant case rested not on a conclusive presumption, but on a finding reached after Jacqueline was afforded a full hearing on the question whether she was an inadequate parent.

The decision of the Illinois Supreme Court that, in effect, a divorced woman's ostensible violation of the Illinois fornication statute presumptively harmed the best interests of the children and that this was conclusive for purposes of custody presents a serious question under the Fourteenth Amendment. Giving conclusive effect to such a violation would appear to contravene the teaching of *Stanley* v. *Illinois:*

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. . . . Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring." *Id.*, at 654–655 (footnotes omitted).

I had supposed that *Stanley* established the proposition that "the interest of a parent in the companionship, care, custody,

[3] The best interests of the child may be sufficiently adversely affected to justify custody modification under Illinois law where, *inter alia*, "the child's present environment endangers seriously his physical, mental, moral or emotional health. . . ." Ill. Rev. Stat., ch. 40, § 610 (b) (3) (1977).

and management of his or her children," *id.*, at 651, cannot be determined by the evidentiary shortcut of a conclusive presumption. Thus, for purposes of this case, *Stanley* would seem to foreclose custody modification on the basis of a similar conclusive presumption of serious adverse effect on the children's best interests despite whatever contrary evidence may have been or might be adduced. This is particularly true since there is no rational basis for the conclusive presumption actually utilized, whether Jacqueline is viewed as having violated the fornication statute only or as being a lawbreaker generally.

Nothing in the record or in logic supports a conclusion that divorced parents who fornicate, for that reason alone, are unfit or adversely affect the well-being and development of their children in any degree over and above whatever adverse effect separation and divorce may already have had on the children. Illinois seldom, if ever, enforces its fornication statute[4] and therefore can hardly contend that there is a rational correlation between divorced parents who fornicate and divorced parents who impair the healthy development of their children.

Nor can Jacqueline be presumed to have an adverse effect on her children's well-being because she is a lawbreaker, for surely such a presumption would be irrationally overbroad. It would make no sense to treat murder, fornication, and traffic violations similarly for purposes of custody modification. If Illinois' enforcement record is an indication of how important it views violations of various laws, it appears that Illinois attempts to enforce its traffic laws more frequently than its "seldom-enforced fornication statute." 78 Ill. 2d, at 352, 400 N. E. 2d, at 427 (Moran, J., dissenting). If Jacqueline had violated Illinois' traffic laws, she might have lost her driver's license, but surely not custody of her children.

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[4] Illinois did not enforce its fornication statute in this case.

Moreover, not only is there no basis for conclusively presuming that Jacqueline's cohabitation would adversely affect her children sufficiently to justify modification, but also any such conclusion is unequivocally rejected by the record which affirmatively shows that the "children were healthy, well adjusted, and well cared for." *Id.*, at 351, 400 N. E. 2d, at 426 (Goldenhersh, C. J., dissenting). There was no evidence of actual harm; nor was there evidence, statistical or otherwise, to suggest that the children's current exposure to their mother's cohabitation might result in harm to them that might become manifest only in the future. Surely, in any event, it is no more likely that divorced mothers who fornicate are unfit than are unwed fathers. Thus, this case squarely presents the question whether the Due Process Clause entitles Jacqueline to a meaningful hearing at which the trial judge determines, without use of a conclusive presumption, whether violation of the fornication statute adversely affects the well-being of the children.

Further, we should grant the petition and address the constitutional question it so clearly presents because the answer to that question has important implications for many households. The 1978 Census Bureau Statistics cited by the Illinois Supreme Court reveal that there are 1.1 million households composed of an unmarried man and woman and that upwards of 25% of those households also include at least one child. *Id.*, at 345, 400 N. E. 2d, at 424. While the statistics do not reveal how many of these households were formed after a divorce, and with respect to which the noncustodial divorced parent may be able to seek custody, the crude figures alone suggest that the custodial pattern is a pervasive one.

Accordingly, I dissent from the denial of certiorari and would grant the petition and set the case for oral argument.

MR. JUSTICE BLACKMUN also dissents from the denial of certiorari and would set the case for argument.

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No. 79–1909. CALIFORNIA *v.* MUSANTE. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below 102 Cal. App. 3d 156, 162 Cal. Rptr. 158.

No. 79–1964. ANDRUS, SECRETARY OF THE INTERIOR *v.* BAKER. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 224.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE POWELL join, dissenting.

The issue in this case is whether the Secretary of the Interior has applied an improper standard for determining that a mineral discovery is "valuable" under 30 U. S. C. § 22.[1] Because I believe that issue to be an important one deserving review here, and because the decision and judgment of the Court of Appeals may well thwart a proper attempt on the part of the Secretary to reject excessive mining claims while preserving the public's right to enjoy its lands, I dissent from the denial of certiorari.

In 1952, respondent began to mine cinders from a cone located within a volcanic field on public land near Flagstaff, Arizona. In 1965, he applied to the Bureau of Land Management of the Department of the Interior for a patent covering five 20-acre placer mining claims for cinders on land on which he claimed to have discovered "valuable mineral deposits." Respondent's claims covered an estimated 15 million tons of cinders. At the request of the Forest Service of the Depart-

[1] Section 22 reads:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

ment of Agriculture, the Bureau issued an administrative contest complaint seeking cancellation of those claims.[2] Over the period from 1953 to 1976, respondent extracted and marketed less than one million tons; of this amount, a substantial portion was sold for purposes not cognizable under the mining laws. The Secretary considered these factors, along with the marginal profitability of the local cinders market, in concluding that respondent's total reserves far exceeded reasonable market demand for the foreseeable future. While validating two of respondent's claims, the Interior Board of Land Appeals nullified two others, reasoning that development of all four claims would be imprudent. 23 I. B. L. A. 319 (1976). Respondents sought judicial review in the United States District Court for the District of Arizona. On cross-motions for summary judgment, that court affirmed the agency's decision. The Court of Appeals, however, vacated and remanded, holding that the Secretary had exceeded his statutory powers in relying on an "excess reserves" analysis to limit the patentability of a mineral claim. 613 F. 2d 224 (CA9 1980).

Two complementary methods for determining whether a mineral deposit is of value have been developed over time. For many years, the "prudent person" test called for validation of mineral claims whenever extraction of the discovered deposits offered a "reasonable prospect of success" to a "person of ordinary prudence." *Castle* v. *Womble,* 19 L. D. 455, 457 (1894). This Court approved that test on numerous occasions, most recently in *Andrus* v. *Charlestone Stone Products Co.,* 436 U. S. 604 (1978). As a refinement on what at times perhaps appeared to be an imprecise standard, the Secretary came to require an applicant to show that his claimed deposit could be extracted and marketed at a profit. In *United States* v. *Coleman,* 390 U. S. 599, 603 (1968), this Court reversed a Court of Appeals' conclusion to the effect that the

[2] The Bureau later dismissed its complaint as to one of the claims.

marketability standard was "different and more onerous" than the prudent person test. The Court viewed the modification as "an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable'." *Id.*, at 602.

I believe that, as in *Coleman*, the Court of Appeals may have unduly restrained the Secretary's authority to evaluate claims of mineral discoveries on public lands; its ruling appears to be based on the perception, possibly a misperception, that the Secretary's "excess reserves" analysis does violence to the statute. In light of that ruling, one now may expect the assertion of additional claims involving "valuable" mineral deposits not marketable in the foreseeable future. This can, and probably will, result in the withdrawal of vast acreage from the public domain for purposes unrelated to mining. Even if Congress later acts to implement the "excess reserves" concept, a prospect at best uncertain, such prospective legislation might not return to the public trust those claims already perfected pursuant to the Court of Appeals' ruling. See *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 335–336 (1963).

The case thus raises a substantial question regarding administration of public lands, and surely is arguably in conflict with the rationale of *United States* v. *Coleman*. I therefore would grant certiorari and have the issue resolved only after plenary consideration.

No. 79–1995. CITY OF LOS ANGELES *v.* LYONS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 615 F. 2d 1243.

JUSTICE WHITE, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

Respondent in this case seeks injunctive and declaratory relief under 42 U. S. C. § 1983 to restrain an alleged practice of the Los Angeles Police Department. Because I believe

that respondent's standing to seek this relief is open to serious question in the light of *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), and *Rizzo* v. *Goode*, 423 U. S. 362 (1976), I dissent from the denial of certiorari.

In February 1977, respondent filed a seven-count complaint against the city of Los Angeles and four of its police officers. Respondent alleged that the four officers stopped his car for a minor traffic violation and that, without any provocation or reason to fear for their safety, they applied strangleholds around his neck, rendering him unconscious. He further alleged that the use of strangleholds in such non-life-threatening situations was a policy of the police department. Respondent sought damages, and injunctive and declaratory relief, claiming that the use of strangleholds in non-life-threatening situations violates the First, Fourth, Eighth, and Fourteenth Amendments.

The only issue before this Court is whether in seeking injunctive and declaratory relief respondent has stated a case or controversy within the jurisdiction of the federal courts. The Court of Appeals, reversing the District Court, held that respondent did have standing. The Court of Appeals distinguished this case from *O'Shea* v. *Littleton*, *supra*, and *Rizzo* v. *Goode*, *supra*, on two grounds: First, there was a greater likelihood in this case that respondent would be subjected at some future date to the alleged illegal conduct; second, respondent did not seek "structural relief" requiring the federal courts to supervise the conduct of state officials, but only an injunction against the use of an established police practice.[1]

[1] The Court of Appeals also suggests that since respondent would have had standing to challenge the practice in the short period of time between his being stopped by the police and their use of a stranglehold upon him, the standing problem here can be analyzed in terms of mootness doctrine. The court believed that although respondent no longer has a live controversy, he falls within two exceptions to the mootness doctrine. First, a voluntary cessation of challenged conduct does not moot a claim if there is a strong possibility of its recurrence. Second, respondent's claim is one

O'Shea and *Rizzo* made clear that the federal courts are not the forum in which dissatisfied citizens may air their disagreements with government policy. The jurisdiction of the federal courts is limited by the case-or-controversy requirement of Art. III. Unless a party demonstrates a "personal stake in the outcome," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), the disagreement may not be settled by the federal courts. For purposes of equitable relief, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects" and if there is no "real and immediate threat of repeated injury" to the plaintiff. *O'Shea* v. *Littleton, supra*, at 495–496. Here, the prospect of future injury rests on the likelihood that respondent will again be stopped or arrested and have the allegedly unconstitutional procedures applied to him. In *O'Shea*, we held that this kind of possibility does not satisfy the case-or-controversy requirement.

There is no question that there is a case or controversy with respect to respondent's right to damages for an alleged past violation of his constitutional rights.[2] However, with respect to a threat of future injury, respondent's position cannot be distinguished from that of any other person who may at some future date have a confrontation with the Los Angeles police. This is the kind of injury we have previously characterized as "abstract" and, therefore, insuf-

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that is "capable of repetition, yet evading review." The first ground, however, merely restates the problem: it is precisely because petitioner does not threaten harm to respondent except in the abstract manner in which everyone in Los Angeles is threatened that respondent's standing is questionable. The second ground is not applicable because the constitutional issue would be addressed in a damages action brought under § 1983.

[2] If this controversy constitutes a § 1983 cause of action, the constitutional issue would be fully litigated in the damages suit.

ficient to create the personal stake required by Art. III. 414 U. S., at 494.

We could not conclude that respondent has standing to press his claims for equitable relief without re-examining our holdings in *O'Shea* and *Rizzo* on the limits of the case-or-controversy requirement of Art. III. Of course, we cannot give plenary consideration to every misapplication of constitutional requirements, but the decision of the Court of Appeals appears so at odds with our precedents that I dissent from denial of certiorari.

No. 79–2068. THOMPSON *v.* MEDICAL LICENSING BOARD OF INDIANA ET AL. Ct. App. Ind. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: — Ind. App. —, 389 N. E. 2d 43, and — Ind. App. —, 398 N. E. 2d 679.

No. 80–147. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL No. 627 *v.* GEORGE E. HOFFMAN & SONS, INC. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 617 F. 2d 1234.

No. 80–259. RUTHERFORD ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Motion of American Cancer Society, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 616 F. 2d 455.

No. 80–266. HOWELL *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 383 So. 2d 567.

No. 80–275. DAVIS ET AL. *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 617 F. 2d 1100.

No. 80–290. FIORE *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari. Reported below: 9 Mass. App. 618, 403 N. E. 2d 953.

No. 80–5127. PINEIRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 620 F. 2d 299.

No. 80–5158. ALFREY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 620 F. 2d 551.

No. 80–5204. HULSEY *v.* ARKANSAS. Sup. Ct. Ark.;

No. 80–5215. DAMPIER *v.* GEORGIA. Sup. Ct. Ga.; and

No. 80–5228. MATA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 80–5204, 268 Ark. 312, 595 S. W. 2d 934; No. 80–5215, 245 Ga. 426, 265 S. E. 2d 565, and 245 Ga. 882, 268 S. E. 2d 349; No. 80–5228, 125 Ariz. 233, 609 P. 2d 48.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 80–5284. SARTO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. JUSTICE MARSHALL would grant certiorari.

OCTOBER 21, 1980

*Miscellaneous Orders**

No. A–332. NATIONAL REPUBLICAN SENATORIAL COMMITTEE *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE ET AL. Motion to vacate the temporary stay, heretofore entered by the THE CHIEF JUSTICE on October 17, 1980, denied.

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*For order amending the Court's Rules, see *post*, p. 1137.

OCTOBER 27, 1980

Dismissal Under Rule 53

No. 80–5055. KENNEDY *v.* FAIRMAN, WARDEN. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 618 F. 2d 1242.

NOVEMBER 3, 1980

Appeals Dismissed

No. 79–6743. ALLISON *v.* FULTON-DE KALB HOSPITAL AUTHORITY. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 245 Ga. 445, 265 S. E. 2d 575.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The issue on this appeal is whether the Georgia Supreme Court's reliance upon a newly announced state procedural rule requiring litigants to raise federal constitutional claims earlier than other claims constituted reliance upon an independent and adequate state ground barring this Court's jurisdiction.

Appellee Fulton-De Kalb Hospital Authority filed a complaint on February 5, 1975, against appellant Allison for hospital expenses incurred by his 16-year-old daughter when she gave birth to an illegitimate child. There was no contract between Allison and the hospital. Instead, the suit was brought under a now repealed Georgia paternal child-support statute making it the duty of the father to provide for the "maintenance, protection, and education of his child" until majority. Ga. Code § 74–105 (1978).[1]

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[1] The new Georgia statute, enacted soon after this Court's decision in *Orr* v. *Orr*, 440 U. S. 268 (1979), states:

"Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to

Allison's answer to the complaint denied owing any money; however, his answer failed to raise any constitutional challenge to the statute. In April 1976, the hospital answered interrogatories revealing, *inter alia*, that Allison was billed because of his status as father of the minor patient. Almost three years later, but still before the start of trial, *Orr* v. *Orr*, 440 U. S. 268 (1979), was decided by this Court, and Allison amended his answer to include an equal protection challenge to the statute. His case was tried several days later, and resulted in entry of judgment for the hospital. Observing that the debt was incurred more than four years before *Orr* was decided, the trial court, without analysis, concluded, *inter alia*, that the constitutional defense established by *Orr* should not be given retroactive effect.

On appeal, the Georgia Supreme Court affirmed the judgment, refusing to reach the constitutional question on the ground that it had not been timely raised. The court noted that under state case law, constitutional challenges must be raised "at the first opportunity," which the court interpreted as occurring when "the law which is subject to constitutional objection comes to the attention of the challenger's attorney," 245 Ga. 445, 446, 265 S. E. 2d 575, 576 (1980). In this case, the court interpreted the rule to require constitutional challenge at least at the time the hospital answered Allison's interrogatories.

Because I entertain serious doubt whether our decided cases permit the Georgia Supreme Court to avoid decision of Allison's federal constitutional claim by charging him with the duty to anticipate application of the new procedural rule announced in his case, *NAACP* v. *Alabama*, 357 U. S. 449, 457–458 (1958), and because I doubt in any event that the rule serves a legitimate state interest, *Henry* v. *Mississippi*,

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the extent that the duty of one parent is otherwise or further defined by court order." Ga. Code Ann. § 74–105 (1979).

379 U. S. 443, 447–448 (1965); *Ward* v. *Board of County Comm'rs*, 253 U. S. 17, 22–23 (1920), I think that the case presents a substantial federal question: whether the new rule constitutes an independent and adequate state ground precluding our consideration of Allison's federal constitutional claim.

The Georgia Supreme Court's interpretation of "at the first opportunity" is not supported by prior precedent in the Georgia case law.[2] But more important, Georgia's civil practice statute directly conflicts with the Georgia Supreme Court's interpretation. That statute states that a "party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order." Ga. Code § 81A–115 (a) (1978). Appellant asserts, without contradiction from appellee, that there was no pre-trial order entered prior to appellant's amendment of his answer. Therefore, it would appear that Allison was entitled to amend his pleading (as he did) under § 81A–115 (a) "as

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[2] The Georgia Supreme Court cited only *Brackett* v. *State*, 227 Ga. 493, 181 S. E. 2d 380 (1971), and 5 Encyclopedia of Georgia Law § 182 (1977), to support its holding. But *Brackett* states without further explanation the general proposition that constitutional claims must be raised "at the first opportunity." 227 Ga., at 495, 181 S. E. 2d, at 382. The claim in *Brackett* was not raised before the start of trial, as here, but after the guilty verdict was returned. It was this timing the court considered to be too late. The Encyclopedia states that constitutional claims generally may not be raised after trial, and also comments that, if the constitutional "point is apparent at the outset, it may be raised by demurrer or other pleading." § 182, p. 530. Certainly appellant might properly believe that amending his answer before trial would suffice under this view of the law.

Other Georgia cases dealing with the definition of "at the first opportunity" similarly fail to support the Georgia Supreme Court's interpretation here. See, *e. g.*, *Woods* v. *State*, 222 Ga. 321, 322, 149 S. E. 2d 674, 677 (1966); *Loomis* v. *State*, 203 Ga. 394, 404–405, 47 S. E. 2d 58, 64 (1948); *Boyers* v. *State*, 198 Ga. 838, 841–843, 33 S. E. 2d 251, 254–255 (1945).

a matter of course and without leave of court." [3] The Georgia Supreme Court, inexplicably, does not refer to this statute. Certainly appellant cannot be charged with anticipating the Georgia Supreme Court's interposition of this new procedural rule.[4] This is yet another case, therefore, where novelty in procedural requirements cannot defeat review by this Court when a party justifiably acted in reliance on prior state law. *Blair* v. *Kentucky*, No. 79–1795, and *Carpenter* v. *Kentucky*, No. 79–1798, *post*, p. 962 (BRENNAN, J., joined by MARSHALL, J., dissenting); [5] *NAACP* v. *Alabama*, *supra*, at 457–458.

In any event, it is highly doubtful that this rule serves a legitimate state interest. The rule discriminates against federal constitutional claims by placing additional burdens on them that are not placed on state-law claims: the federal constitutional challenge can only be considered if raised as soon as the challenging party becomes aware of the allegedly unconstitutional law; the state-law challenge can be considered if it is raised at any time prior to entry of a pretrial order. Such a distinction between federal constitutional and state-law claims belies any genuine state interest in the rule. At least as long as the constitutional claim is made at a time when the court may consider and decide it without disruption

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[3] Even if a pretrial order had been entered, the result here would be the same. The statute further states that a "party may [thereafter] amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Ga. Code § 81A–115 (a) (1978). The statute nowhere suggests that constitutional claims will be treated specially. The Georgia Supreme Court's new rule vitiates the discretion given by the statutory language to the trial judge to grant leave to amend "when justice so requires."

[4] The trial court itself thought appellant's constitutional claim timely, and gave it full consideration.

[5] Unlike petitioners in *Blair* and *Carpenter*, however, since this is a civil case, appellant will have no other federal-court remedy if we refuse to consider his appeal.

of the proceeding, the state interest in judicial efficiency is served. The Georgia Supreme Court asserts that a defendant must not be allowed to delay the raising of "defenses indefinitely in hopes that a decision will be rendered which provides him with an arguable constitutional defense," 245 Ga., at 446–447, 265 S. E. 2d, at 576–577,[6] but surely this rationale is equally applicable to changes in state law. Similarly, the rationale that requiring early presentation of claims might serve state interests in promoting settlement before trial and apprising parties of the opposing side's case is equally applicable to state-law as well as constitutional claims. In short, the Georgia Supreme Court's procedural rule effects an unnecessary and irrational discrimination against federal constitutional claims.

I would therefore at least postpone the question of jurisdiction and set the case for oral argument.[7]

No. 80–189. GRANT-BILLINGSLEY WHOLESALE LIQUOR CO., INC. *v.* LENNEN, SECRETARY OF REVENUE OF KANSAS, ET AL. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 227 Kan. 179, 606 P. 2d 102.

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[6] Appellant did move for four continuances before the trial began, but there is no evidence of bad-faith dilatory tactics.

[7] Appellee does not appear to contest Allison's claim that the challenged statute is unconstitutional. Indeed, § 1 of the Family and Domestic Relations Law Amended Act (1979) states:

"It is the intent of this Act to revise and modernize certain laws of this State which relate to intrafamilial duties, rights, and obligations, including laws relating to . . . support of minors . . . so as to comply with those standards of equal protection under the law announced in the United States Supreme Court decision in the case of *Orr* v. *Orr*." 1979 Ga. Laws 469.

The remaining question, therefore, is whether *Orr* should be given retroactive effect in this case. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 105–109 (1971).

No. 80-301. WAYNE HAVEN NURSING HOME ET AL. *v.* FINLEY, STATE COMMISSIONER OF HEALTH, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 83 N. J. 67, 415 A. 2d 1147.

No. 80-313. SUTTON *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 70 App. Div. 2d 467, 421 N. Y. S. 2d 371.

No. 80-5061. O'CONNOR ET UX. *v.* PALLUDAN CORP. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80-5308. BECKER *v.* EVANS. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80-322. KORN *v.* OHIO. Appeal from Ct. App. Ohio, Marion County, dismissed for want of substantial federal question.

No. 80-377. VOGEL *v.* ROBINSON ET AL. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of substantial federal question. Reported below: 80 Ill. App. 3d 312, 399 N. E. 2d 688.

No. 80-5361. GOUDIE *v.* HACKMAN ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 79–1886. CALIFORNIA *v.* LEVEL. Ct. App. Cal., 2d App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeal to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). Reported below: 103 Cal. App. 3d 899, 162 Cal. Rptr. 682.

No. 80–74. TAPIA-ACUNA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief filed October 3, 1980. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST dissent and would deny the petition for writ of certiorari. Reported below: 620 F. 2d 311.

No. 80–274. CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA (ENGERT ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Motion of respondents Engert and Gamble for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeal to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE STEVENS dissent. Reported below: 105 Cal. App. 3d 365, 164 Cal. Rptr. 210.

No. 80–5132. C. P. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rhode Island* v. *Innis*, 446 U. S. 291 (1980). Reported below: 411 A. 2d 643.

Miscellaneous Orders

No. A–357. MARQUEZ ET AL. *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. A–361. PUERTO RICO *v.* MUSKIE, SECRETARY OF STATE, ET AL. C. A. 1st Cir. The order entered by JUSTICE BRENNAN on October 24, 1980, is vacated, and the applications for stay are denied.

No. 79–395. UNITED STATES *v.* MORRISON. C. A. 3d Cir. [Certiorari granted, 448 U. S. 906.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 79–678. SAN DIEGO GAS & ELECTRIC CO. *v.* CITY OF SAN DIEGO ET AL. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction postponed, 447 U. S. 919.] Motion of the Solicitor General for divided argument denied. Motion of San Diego Urban League for divided argument denied.

No. 79–814. DELTA AIR LINES, INC. *v.* AUGUST. C. A. 7th Cir. [Certiorari granted, 446 U. S. 907.] Motion of the Solicitor General for divided argument granted.

No. 79–824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79–827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, 445 U. S. 914.] Motion of respondents for divided argument granted.

No. 79–983. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 1068]; and

No. 79–1689. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 447 U. S. 919.] Motion of Washington State Bar Association for leave to file an untimely brief as *amicus curiae* denied.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 447 U. S. 920.] Motion of Trans World Airlines, Inc., for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 79–1176. CITY OF MEMPHIS ET AL. *v.* GREENE ET AL. C. A. 6th Cir. [Certiorari granted, 446 U. S. 934.] Motion of Hein Park Civic Association for leave to file a brief as *amicus curiae* granted. Motion of respondents for divided argument denied.

No. 79–1213. MINNICK ET AL. *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 448 U. S. 910.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied.

No. 79–1236. CARSON ET AL. *v.* AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO CO., ET AL. C. A. 4th Cir. [Certiorari granted, 447 U. S. 920.] Motion of respondent Unions for divided argument granted. Motion of the Solicitor General for divided argument granted.

No. 79–1260. CHANDLER ET AL. *v.* FLORIDA. Sup. Ct. Fla. [Probable jurisdiction noted, 446 U. S. 907.] Motion of appellee for divided argument granted.

No. 79–6624. ROSALES-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 819.] Motion for appointment of counsel granted, and it is ordered that John J. Cleary, Esquire, of San Diego, Cal., be appointed to serve as counsel for petitioner in this case.

No. 79–1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.;

No. 79–1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79–1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79–1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79–1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motion of Congress of Advocates for the Retarded, Inc., et al. for leave to file a brief as *amici curiae* granted. Motion of respondents for divided argument granted. Motion of Illinois et al. for leave to participate in oral argument as *amici curiae* denied. Motion of petitioners for divided argument granted. Motion of American Psychiatric Association for leave to participate in oral argument as *amicus curiae* denied.

No. 79–5962. VINCENT *v.* TEXAS. Ct. Crim. App. Tex. [Probable jurisdiction postponed, 445 U. S. 960.] Motion of appellee to dismiss the appeal denied.

No. 79–6777. STEAGALD *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 819.] Motion for appointment of counsel granted, and it is ordered that John Richard Young, Esquire, of Atlanta, Ga., be appointed to serve as counsel for petitioner in this case.

No. 79–6779. LITTLE *v.* STREATER. App. Sess., Super. Ct. Conn., New Haven Jud. Dist. [Probable jurisdiction noted, *ante*, p. 817.] Motion for appointment of counsel granted, and it is ordered that Jon C. Blue, Esquire, of Hartford, Conn., be appointed to serve as counsel for appellant in this case.

No. 80–299. JOHN NUVEEN & CO., INC., ET AL. *v.* SANDERS ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE STEVENS took no part in the consideration or decision of this order.

No. 80–323. COLUMBIA BROADCASTING SYSTEM, INC. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE STEWART took no part in the consideration or decision of this order.

No. 80–461. RETAIL, WHOLESALE & DEPARTMENT STORE UNION, AFL–CIO *v.* G. C. MURPHY CO. C. A. 3d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 80–5202. IN RE MAGEE. Petition for writ of mandamus denied.

No. 80–5341. IN RE JACKSON. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 79–1943. ALESSI ET AL. *v.* RAYBESTOS-MANHATTAN, INC., ET AL. Appeal from C. A. 3d Cir. Probable jurisdiction noted, case consolidated with No. 80–193 [*Buczynski et al.* v. *General Motors Corp. et al.*], *infra*, and a total of one hour allotted for oral argument. Reported below: 616 F. 2d 1238.

Certiorari Granted

No. 79–1144. TEXAS INDUSTRIES, INC. *v.* RADCLIFF MATERIALS, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 604 F. 2d 897.

No. 80–298. MONROE *v.* STANDARD OIL CO. C. A. 6th Cir. Certiorari granted. Reported below: 613 F. 2d 641.

No. 80–317. UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH. C. A. 5th Cir. Certiorari granted. Reported below: 616 F. 2d 127.

No. 80–429. COUNTY OF WASHINGTON, OREGON, ET AL. *v.* GUNTHER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 602 F. 2d 882 and 623 F. 2d 1303.

No. 80–54. ITT GILFILLAN *v.* CLAYTON; and

No. 80–5049. CLAYTON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 9th Cir. Motion of petitioners in No. 80–5049 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 623 F. 2d 563.

No. 80–193. BUCZYNSKI ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. Certiorari granted, case consolidated with No. 79–1943 [*Alessi et al.* v. *Raybestos-Manhattan, Inc., et al.*], *supra*, and a total of one hour allotted for oral argument. Reported below: 616 F. 2d 1238.

No. 80–207. CBS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 80–213. AMERICAN BROADCASTING COS., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 80–214. NATIONAL BROADCASTING CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 202 U. S. App. D. C. 369, 629 F. 2d 1.

No. 80–120. ST. MARTIN EVANGELICAL LUTHERAN CHURCH ET AL. *v.* SOUTH DAKOTA. Sup. Ct. S. D. Motion of Alabama et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 290 N. W. 2d 845.

No. 80–332. RHODES, GOVERNOR OF OHIO, ET AL. *v.* CHAPMAN ET AL. C. A. 6th Cir. Motion of respondent Chapman for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 624 F. 2d 1099.

No. 80–5303. BELTRAN *v.* MYERS, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF HEALTH, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted limited to Question 1 presented by the petition. Reported below: 622 F. 2d 1304.

Certiorari Denied. (See also Nos. 79–6743, 80–301, 80–313, 80–5061, and 80–5308, *supra.*)

No. 79–2051. CITY OF APOPKA, FLORIDA, ET AL. *v.* DOWDELL ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–2054. LEWIS ET AL. *v.* MCGRAW ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 192.

No. 79–2062. CHOATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 21.

No. 79–6761. JOHNSON *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 79–6829. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79–6834. EVANS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 80 Ill. App. 3d 444, 399 N. E. 2d 1333.

No. 79–6854. KEAGBINE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 1039, 396 N. E. 2d 1341.

No. 79–6870. BYRNE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 595 S. W. 2d 301.

No. 79-6888. THERIAULT *v.* CHARLES COLSON PRISON FELLOWSHIP ET AL. C. A. 6th Cir. Certiorari denied.

No. 80-20. SQUIRES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80-57. DOUBLE "Q", INC. *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 602.

No. 80-76. VALDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 59.

No. 80-135. STEVENS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-159. GREEN *v.* AMERADA HESS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 212.

No. 80-161. FREEDLANDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 625 F. 2d 111.

No. 80-192. MARTORANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 620 F. 2d 912.

No. 80-241. KABLE PRINTING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80-246. COMMUNITY GRAIN, INC. *v.* COOK INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 978.

No. 80-280. CONSOLIDATED OIL & GAS, INC., ET AL. *v.* KING RESOURCES CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 703.

No. 80-281. OKC CORP. *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 58.

No. 80–284. SEQUOYAH ET AL. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 1159.

No. 80–296. EMPRESAS ELECTRONICAS WALSER, INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 223 Ct. Cl. 686, 650 F. 2d 286.

No. 80–300. VIELEHR *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 392, 163 Cal. Rptr. 795.

No. 80–306. COLEBANK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 57, 610 F. 2d 999.

No. 80–307. STEPHENS INSTITUTE, DBA ACADEMY OF ART COLLEGE *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 720.

No. 80–314. FACTORS ETC., INC. *v.* MEMPHIS DEVELOPMENT FOUNDATION. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 956.

No. 80–316. ALEXANDER *v.* GINO'S INC. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 71.

No. 80–319. MENCHACA ET UX. *v.* CHRYSLER CREDIT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 507.

No. 80–324. CONIGLIO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 1004, 426 N. Y. S. 2d 891.

No. 80–325. RADOMSKI, AKA KNIGHT *v.* KNIGHT ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 414 A. 2d 1211.

No. 80–326. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 507.

No. 80–334. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 80–335. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 623 F. 2d 535.

No. 80–339. SECURITY MANAGEMENT CO., INC., ET AL. *v.* ROTHENBERG ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 1149.

No. 80–344. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 893.

No. 80–345. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 293.

No. 80–349. NATIONAL CHAMBER ALLIANCE FOR POLITICS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 322, 627 F. 2d 375.

No. 80–350. SEA-LAND SERVICE, INC., ET AL. *v.* MILOS. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 574.

No. 80–353. SANTORA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 1052.

No. 80–355. REYNOLDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 624 F. 2d 95.

No. 80–357. MCMAHON ET AL. *v.* CITY OF VIRGINIA BEACH. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. 102, 267 S. E. 2d 130.

No. 80–360. MIDESSA TELEVISION CO., INC., ET AL. *v.* MIDLAND TELECASTING CO. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 1141.

No. 80–361. MALMED ET AL. *v.* THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 565.

No. 80–363. LEWIS *v.* LEWIS ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 80–364. ATESER ET UX. *v.* PUBLIC HOSPITAL DISTRICT NUMBER ONE, DBA VALLEY GENERAL HOSPITAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 309.

No. 80–367. PRESBYTERIAN CHURCH OF HARRISBURG *v.* LIBERTY MUTUAL INSURANCE CO. Super. Ct. Pa. Certiorari denied. Reported below: 273 Pa. Super. 302, 417 A. 2d 660.

No. 80–370. FARKAS *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–373. DRIZIN ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 512.

No. 80–385. SHAW *v.* HOSPITAL AUTHORITY OF COBB COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 946.

No. 80–408. BAKER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 292.

No. 80–413. KANSAS CITY SOUTHERN RAILWAY CO. *v.* GREAT LAKES CARBON CORP. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 822.

No. 80–414. COLLINS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 832.

No. 80–417. ANDERSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 841, 267 S. E. 2d 259.

No. 80–430. GRASSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1295.

No. 80–433. COLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 98.

No. 80–448. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied. Reported below: 181 Conn. 296, 435 A. 2d 350.

No. 80–462. TRIMARCHE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1206.

No. 80–475. SPRINGPARK ASSOCIATES *v.* CROWN LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1377.

No. 80–479. FRENCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 628 F. 2d 1069.

No. 80–492. ANDERSON *v.* BOLGER, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 81.

No. 80–513. LANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1336.

No. 80–527. MYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 932.

No. 80–538. CIAMPAGLIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 632.

No. 80–539. TALBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 80–5019. BORRELLI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 621 F. 2d 1092.

No. 80–5030. SINCLAIR *v.* BROWN, DISTRICT ATTORNEY, PARISH OF EAST BATON ROUGE. Sup. Ct. La. Certiorari denied. Reported below: 385 So. 2d 787.

No. 80–5032. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1109.

No. 80–5072. WATSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80–5083. GAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 623 F. 2d 673.

No. 80–5089. MCDONALD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 387 So. 2d 1116.

No. 80–5101. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 339.

No. 80–5106. CROSS *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 293.

No. 80–5112. PERRY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 268, 163 Cal. Rptr. 522.

No. 80–5115. WATTS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–5137. GREEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 891, 408 N. E. 2d 675.

No. 80–5151. BAUN *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–5167. BILBREY *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5170. ALBRIGHT *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 96 Wis. 2d 122, 291 N. W. 2d 487

No. 80–5175. BULLOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1082.

No. 80–5184. EDWARDS *v.* ANDREWS, ASSISTANT WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5191. HARRIS *v.* ADAMS. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 543.

No. 80–5193. WRIGHT *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 80–5209. BRYANT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 949, 409 N. E. 2d 999.

No. 80–5217. BROWN *v.* JERNIGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 914.

No. 80–5222. HOLT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–5229. MCKINNEY *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5238. BURLESON *v.* TURNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 859.

No. 80–5240. RIDDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 80–5242. SPRADLEY *v.* FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 783.

No. 80–5243. HARNEST *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 595 S. W. 2d 865.

No. 80–5246. BRACKETT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 160, 269 S. E. 2d 420.

No. 80–5254. KINNELL *v.* ATKINS ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5255. KINNELL *v.* MEARA, BURBON COUNTY ATTORNEY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5256. SANDERS ET AL. *v.* HANKINS. Ct. Sp. App. Md. Certiorari denied.

No. 80–5265. BAGGETT *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 859.

No. 80–5273. GHIONE *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 191.

No. 80–5274. TWYMAN *v.* HESS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5276. LANDI *v.* CALIFORNIA. Super. Ct. Cal., County of Solano. Certiorari denied.

No. 80–5278. MARTINEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 94 N. M. 436, 612 P. 2d 228.

No. 80–5280. CHICCO *v.* JONES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80–5285. INGRAM *v.* PRUITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 861.

No. 80–5287. GREEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–5288. PHILLIPS *v.* NIGH, GOVERNOR OF OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied.

No. 80–5291. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 600 S. W. 2d 344.

No. 80–5296. TYSON *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 80–5298. GERHARDT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5300. LEONARD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 300 N. C. 223, 266 S. E. 2d 631.

No. 80–5309. DICKINSON *v.* SEIGLER ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5315. MAGGARD *v.* FLORIDA PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 890.

No. 80–5319. JOHNSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–5322. CAMP *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 244, 163 Cal. Rptr. 510.

No. 80–5323. FLOYD *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 598 S. W. 2d 517.

No. 80–5330. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 837.

No. 80–5336. MOSER *v.* WILSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 862.

No. 80–5343. DOWLING *v.* GOVERNMENT OF THE VIRGIN ISLANDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 660.

No. 80–5358. DANTZLER *v.* DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA EX REL. MORRIS. Sup. Ct. Fla. Certiorari denied. Reported below: 386 So. 2d 635.

No. 80–5363. BUSIC ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–5368. SALINAS *v.* UNITED STATES; and
No. 80–5393. MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 1092.

No. 80–5370. YOUNG *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 80–5373. COCHRAN *v.* MANOS. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 301.

No. 80–5376. MCCLURE *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied.

No. 80–5397. MCDONALD *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1100.

No. 80–5404. PANA *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5419. HARRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 15, 627 F. 2d 474.

No. 80–5421. STEPHENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–5431. MOORE *v.* MOORE. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 729.

No. 80–5434. ROBERTSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1095.

No. 80–5437. ARMSTRONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5453. TECUMSEH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 630 F. 2d 749.

No. 80–5469. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 792.

No. 80–5483. EUBANKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–5486. PAUL *v.* UNITED STATES BUREAU OF PRISONS. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1092.

No. 80–5489. CLAYTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 79–1795. BLAIR *v.* KENTUCKY; and

No. 79–1798. CARPENTER ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 592 S. W. 2d 132.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

These petitions present the question whether the decision of the Supreme Court of Kentucky rests upon an independent and adequate state procedural ground that bars this Court's review of petitioners' constitutional claim, *inter alia*, that their convictions were based on a record lacking sufficient evidence. Because the question of when and how failure to comply with state procedural rules precludes our consideration of a federal constitutional claim is itself a federal question, *Henry* v. *Mississippi*, 379 U. S. 443, 447–448 (1965), and because I have serious doubts whether the Kentucky Supreme Court could properly insist on compliance with the procedural rule it invoked, I dissent from the denial of certiorari.

Petitioners Carpenter, Borders, and Blair were convicted in a Kentucky trial court of wanton endangerment in the first degree and criminal mischief in the third degree. The charges stemmed from the allegation that they fired a shotgun at businesses and automobiles injuring one person and damaging property. All three petitioners moved for directed verdict of acquittal at the close of the Commonwealth's case, and also moved for new trial after the jury verdict. Both motions were grounded on claims that the evidence was insufficient to sustain guilty verdicts. However, no petitioner

moved for a directed verdict on that ground at the close of all the evidence.

The Kentucky intermediate appellate court entertained petitioners' appeals from their convictions, and set them aside after finding that the evidence was insufficient to sustain the convictions.[1] The Supreme Court of Kentucky affirmed as to Carpenter and Borders, but reversed as to Blair. The court rejected the Commonwealth's argument that under state procedural law, *Kimbrough* v. *Commonwealth,* 550 S. W. 2d 525, 529 (Ky. 1977), petitioners Carpenter and Borders' failure at the close of all the evidence to move for a directed verdict for insufficiency of the evidence forfeited their right of review on that ground. Citing *Vachon* v. *New Hampshire,* 414 U. S. 478, 480 (1974), the Kentucky Supreme Court not only held that "the evidence was insufficient" but also concluded that "the record before us contains *no relevant evidence* linking Carpenter and Borders to the charged offenses." (Emphasis added.) Blair's case differed, the court held, because there was "relevant evidence" as to him. See *Thompson* v. *Louisville,* 362 U. S. 199, 206 (1960). The court therefore applied the *Kimbrough* rule and held that Blair had waived his right to raise the insufficiency-of-the-evidence issue on appeal.

The Commonwealth filed a petition for rehearing. This time, the Kentucky Supreme Court reversed itself and reinstated the convictions of Carpenter and Borders. The court held that, "as clarified in *Kimbrough,* . . . in order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use the insufficiency as a basis for his appeal must have moved for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case in chief." 592 S. W. 2d 132, 133 (1979).

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[1] The Court of Appeals initially remanded for a new trial but six months later withdrew that original opinion and substituted a new one reversing the convictions outright.

But *Kimbrough* was decided eight months after petitioners' trial and announced new Kentucky law. Prevailing Kentucky law at the time of the trial embodied the procedural rule that the issue of insufficiency of the evidence was preserved for appellate review when the motion for a directed verdict was made *either* at the close of the Commonwealth's case *or* at the close of all the evidence. *Crain* v. *Commonwealth*, 484 S. W. 2d 839, 842 (1972).[2] Plainly petitioners could not fairly be charged with anticipating the new rule first announced eight months after their trial. This is thus clearly a case where "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied

[2] Every other case cited by the Kentucky Supreme Court in support of the *Kimbrough* procedural rule was decided after *Kimbrough*. The Commonwealth's brief cites two cases, *Delong* v. *Commonwealth*, 225 Ky. 461, 9 S. W. 2d 136, 137 (1928), and *Harvey* v. *Commonwealth*, 423 S. W. 2d 535, 537 (Ky. 1967), both decided before petitioners' trial, for the view that *Kimbrough* merely reiterated prior state law. If anything, however, these two cases lend support for the opposite proposition that, prior to *Kimbrough*, the court would review a claim that the trial court erred in denying a motion for a directed verdict made at the close of the prosecutor's case. In *Delong*, the defendants claimed that the trial court's failure to direct a verdict on their motion at the close of the Commonwealth's case was reversible error. The appellate court noted that, instead of resting their case after their motion, defendants proceeded to "take the stand and . . . furnis[h] enough evidence themselves to sustain the conviction." 225 Ky., at 463, 9 S. W. 2d, at 137. The court therefore declined to reverse the trial court, not because defendants failed to renew their motions for directed verdicts, but precisely because the court, after reviewing the full evidentiary record, found sufficient evidence to support their convictions.

In *Harvey*, the court similarly concluded after a review of all the evidence that "any deficiency which may have existed in the Commonwealth's evidence" was rectified after defendant presented his evidence. 423 S. W. 2d, at 537. For this reason, the court found no reversible error in the trial court's failure to direct the verdict at the conclusion of the Commonwealth's evidence. This appellate posture also has been regularly followed by the Kentucky courts in the civil context in reviewing a motion for a directed verdict at the close of the plaintiff's case. *E. g.*, *Lyon* v. *Prater*, 351 S. W. 2d 173, 175 (Ky. 1961).

for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP* v. *Alabama*, 357 U. S. 449, 457–458 (1958). See *Henry* v. *Mississippi*, 379 U. S., at 448, n. 3.[3]

These cases are particularly compelling given the two explicit findings by the Supreme Court and Court of Appeals of Kentucky to the effect that the evidence was not only insufficient but also irrelevant to support the guilty verdicts of Carpenter and Borders.[4] Although petitioners may now obtain federal habeas corpus relief, it is wasteful of sparse judicial resources to require resort to that remedy since the issues presented are only questions of law and no hearing is required to develop a record upon which to decide the cases.[5]

Because I am unable to reconcile the Kentucky Supreme Court's procedural holding in the present cases with its unambiguous procedural rule applicable at the time of petitioners' trial, I would grant the petitions for certiorari.

No. 80–64. EGBERT *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 227 Kan. 266, 606 P. 2d 1022.

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[3] The Commonwealth's argument that Kentucky Criminal Rule 9.54 (2), applicable at the time of petitioners' trial, effectively embodied the *Kimbrough* rule, is unavailing. The Kentucky Supreme Court relied solely on *Kimbrough* and later cases in reversing itself and did not so much as mention Rule 9.54 (2). In any event, the Rule, which deals with motions for jury instructions "fairly and adequately presented," on its face does not support the *Kimbrough* rule, and interpretative case law is similarly unsupportive.

[4] Because the convictions of Carpenter and Borders were struck down under the "no evidence" test, *Thompson* v. *Louisville*, 362 U. S. 199, 206 (1960), it follows *a fortiori* that the convictions were faulty under the now controlling insufficiency-of-the-evidence constitutional standard, *Jackson* v. *Virginia*, 443 U. S. 307, 318–319 (1979). Moreover, although the Supreme Court found "relevant evidence" linking Blair to the crime, this would not end the inquiry as to him under the *Jackson* test.

[5] This is certainly true at least as to Carpenter and Borders.

No. 80–100. LORAIN JOURNAL CO. ET AL. *v.* MILKOVICH. Ct. App. Ohio, Lake County. Motions of Beacon Journal Publishing Co. et al. and Ohio Newspapers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEWART would deny this petition for want of a final judgment. Reported below: 65 Ohio App. 2d 143, 416 N. E. 2d 662.

JUSTICE BRENNAN, dissenting.

This petition for certiorari raises an important question concerning limitations on the authority of trial courts to grant dismissals, summary judgments, or judgments notwithstanding the verdict [1] in favor of media defendants in libel actions, based on the qualified privilege outlined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

On January 8, 1975, the News-Herald of Willoughby, Ohio, published a column by sportswriter Ted Diadiun criticizing respondent Michael Milkovich, a wrestling coach at Maple Heights High School, who is treated as a "public figure" for purposes of this case. Headlined "Maple beat the law with the 'big lie,'" the column accused Milkovich of lying about a fracas that occurred during one of his team's wrestling matches.

On February 9, 1974, the Maple High wrestling team, coached by Milkovich, faced a team from Mentor High School. A brawl involving both wrestlers and spectators erupted after a controversial ruling by a referee. Several wrestlers were injured. The Ohio High School Athletic Association (OHSAA) subsequently conducted a hearing into the occurrence, censured Milkovich for his conduct at the match,

[1] Although the decision below concerned directed verdicts, its holding would affect the courts' treatment of summary judgments and judgments notwithstanding the verdict as well. In each of these situations, the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable "clear and convincing evidence" burden of proof.

placed his team on probation for the school year, and declared the team ineligible to compete in the state wrestling tournament. Diadiun attended and reported on both the match and the hearing, at which Milkovich had defended his behavior. Thereafter, a group of parents and high school wrestlers filed suit in Franklin County Common Pleas Court, claiming that the OHSAA had denied the team due process. Milkovich, not a party to that lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that due process had been denied, and enjoined the team's suspension. *Barrett* v. *Ohio High School Athletic Assn.*, No. 74CV–09–3390.[2]

Diadiun did not attend the court hearing, review the transcript, or read the court's opinion, but he wrote a column about the decision based on his own recollection of the wrestling match and ensuing OHSAA hearing and on a description of the court proceeding given him by an OHSAA Commissioner. In the column, Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing, and that Milkovich's testimony "had enough contradictions and obvious untruths so that the six board members were able to see through it." Diadiun went on to say, however, that at the later court hearing Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun concluded that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after. . . having given his solemn oath to tell the truth. But [he] got away with it."

Milkovich filed a libel action in state court against petitioners Diadiun, the News-Herald, and the latter's parent

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[2] The court ruled that the wrestling team was denied its right to cross-examine witnesses and to call witnesses on its behalf. The court did not make any factual findings concerning the underlying occurrences, nor did it comment on those occurrences.

corporation. Petitioners moved for summary judgment. The court held that Milkovich is a public figure for purposes of the *New York Times* test,[3] but denied summary judgment. The action was then tried to a jury. After five days of trial, at the close of Milkovich's evidence, petitioners moved for a directed verdict. They argued that Milkovich had failed to proffer sufficient evidence from which the jury could conclude that Diadiun's column had been published with actual malice under the *New York Times* test. The court granted the motion for directed verdict, stating that the evidence, considered most strongly in favor of Milkovich, "fails to establish by clear and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Milkovich appealed to the State Court of Appeals, which reversed and remanded for trial. The court stated that Diadiun's column conflicted with the factual determination reached in the earlier Common Pleas Court injunctive action, and held that this conflict alone constituted sufficient evidence of actual malice to withstand petitioner's motion for directed verdict.[4] Petitioners appealed to the Ohio Supreme Court,

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[3] The ruling that Milkovich is a public figure is unchallenged.

[4] The court stated:

"In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus, he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. . . . It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the court is overturned on appeal, the determination of what constitutes the truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual

and also sought review in the nature of certiorari. The Ohio Supreme Court dismissed the appeal as raising "no substantial constitutional question" and otherwise denied review. The court also denied petitioners' motion for rehearing.[5]

The import of the Ohio appellate court's holding is plainly that, even in the absence of proof of knowing falsehood or reckless disregard for the truth, a newspaper forfeits its right to a directed verdict, summary judgment, or judgment notwithstanding the verdict on the issue of actual malice if it has published a statement that conflicts, however tangentially, with a decision by a court. This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the "recognized arbiter of the truth," as the court below asserted. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–340 (1974).[6]

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malice' so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the court." 65 Ohio App. 2d 143, 146, 416 N. E. 2d 662, 666 (1979).

[5] Although the appellate court below remanded the case for retrial, including a jury determination on the actual-malice issue, the decision was nonetheless a final judgment for purposes of 28 U. S. C. § 1257. A decision in favor of petitioners would terminate the litigation, while a failure to decide the question now would leave the press in Ohio "operating in the shadow of . . . a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 486 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 246–247 (1974).

[6] Indeed, at common law, a factual finding embodied in the judgment in another cause could not even be used as evidence of that fact in court. 5 J. Wigmore, Evidence § 1671a, pp. 806–807 (Chadbourn rev. 1974).

One part of the "strategic protection" that decisions of this Court have extended to the press in the libel area is the insistence that a public figure can prevail "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz* v. *Robert Welch, Inc., supra,* at 342; *New York Times Co.* v. *Sullivan,* 376 U. S., at 285–286. The court in a libel action has a responsibility to ensure that sufficient evidence of actual malice has been introduced to permit a jury finding under this exacting standard. This protection must not be withdrawn merely because the press account may have differed with the conclusions of a court, lest the "uninhibited, robust, and wide-open," *New York Times* v. *Sullivan, supra,* at 270, discussion of judicial proceedings be deterred. See *Richmond Newspapers, Inc.* v. *Virginia,* 448 U. S. 555 (1980).

The consequence of the erroneous ruling in this case is particularly apparent on the facts: petitioners were denied a directed verdict on the strength of a prior court opinion that did not even discuss, let alone decide, what had happened at the disrupted wrestling match or whether Milkovich had testified truthfully. The court had merely ruled that the Maple High School wrestling team was denied certain procedural safeguards required under due process. Thus, it is abundantly apparent that the state court's conclusion that Diadiun wrote this column "knowing that it conflicts with a judicial determination of the truth" is unpersuasive even on its own terms.

Because in my view the decision of the Ohio appellate court in this case seriously contravenes the principles of the First Amendment as interpreted by this Court, and threatens to chill the freedom of newspapers in Ohio to publish their view of the facts where they differ with the view of the courts, I dissent and would grant certiorari to review this important question of constitutional law.

No. 80–137. DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT OF LOUISIANA *v.* BEAIRD-POULAN, INC. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 255.

JUSTICE REHNQUIST, dissenting.

More than half a century ago, this Court observed that "[t]he settled policy of Congress, in authorizing the taking of land and appurtenances, has been to limit the right to compensation to interests in the land taken." *Mitchell* v. *United States*, 267 U. S. 341, 346 (1925). In 1970, however, Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act, wherein it declared its purpose to "establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 84 Stat. 1895, 42 U. S. C. § 4621. The substantive provisions of the Act provide for actual reasonable expenses in moving the condemnee, his business, his family, his farm, or other personal property, and actual reasonable expenses in searching for a replacement business or farm. The only substantive provisions of the Act dealing with state condemnations in general are carefully treated in 42 U. S. C. §§ 4627 and 4630, which forbid the head of a "Federal agency" to approve a "grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project . . . unless he receives satisfactory assurances from such State agency" that fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a federal agency under the earlier sections of the Act.

We may expect frequent interaction between the Federal and State Governments such as is contemplated by the Act, and the fact that this case raises serious questions under the

Act concerning federal jurisdiction would lead me to grant certiorari.

Beaird-Poulan, a corporation engaged in the manufacture of chain saws, owned a 16.5-acre tract of land in Louisiana. It operated plant facilities on the front portion of this tract, while the rest consisted of unimproved timberland not used for business purposes in any way. In May 1971 the Louisiana Department of Transportation and Development (DOTD) expropriated a 3-acre section of the unused portion of the tract for construction of Interstate 220, a federally assisted highway project. Beaird-Poulan moved some of its facilities to a new plant location after the expropriation, and filed suit against DOTD and the United States Secretary of Transportation in Federal District Court to recover its moving expenses. It alleged that its action arose under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U. S. C. § 4601 *et seq.* Pursuant to § 4630 Louisiana had enacted its own Relocation Assistance Act, La. Rev. Stat. Ann. §§ 38:3101–3110 (West Supp. 1980).

The United States District Court, after preliminary litigation as to the meaning of the Louisiana Constitution, ordered respondent to submit its claim to petitioner, and ordered that petitioner conduct a full, fair, and complete adversary hearing, retaining "jurisdiction of this case to review the administrative determination." After considering respondent's claim petitioner denied it both because the state legislation was not in effect when the claim arose, and because respondent did not qualify as a displaced person.

Beaird-Poulan did not seek either rehearing or review of the DOTD decision in state court[1] but rather filed a motion in Federal District Court stating that it was "aggrieved by the administrative determination . . . and desires that this Court

[1] It appears that such review is available after exhaustion of administrative remedies. See, *e. g., Bounds* v. *State of Louisiana, Department of Highways,* 333 So. 2d 714 (La. App.), writ refused, 338 So. 2d 295 (La. 1976).

review the administrative determination." Over DOTD's objection the court took the case and supplemented the administrative record. The court based its jurisdiction on 28 U. S. C. § 1331 (a) (1976 ed., Supp. III), and concluded that its function was "to review [the DOTD] decision denying relocation assistance benefits." It rejected a contention that judicial review was unavailable, concluding that Congress intended to foreclose review under a separate section covering acquisition policies, 42 U. S. C. § 4651, but not under the relocation provision, 42 U. S. C. § 4622. On the merits the court ruled that Beaird-Poulan was a displaced person and directed DOTD to determine the amount of its moving expenses. 441 F. Supp. 866. The Fifth Circuit affirmed in a one-sentence *per curiam* adopting the District Court opinion as its own. 616 F. 2d 255.

The District Court determined that Congress did not intend to preclude judicial review of *federal* relocation payment determinations under 42 U. S. C. § 4622, but it failed to note that the case before it involved a relocation payment determination made not by a *federal* agency, but by a state agency under state law. Nothing in the Act purports to give federal courts the power to review such determinations of state agencies. Although such silence may not preclude federal judicial review of *federal* agency decisions under the Administrative Procedure Act, 5 U. S. C. § 701, the APA is of course not applicable to state agencies.

The rule that applies to cases such as the present one was stated a quarter of a century ago in *Chicago, R. I. & P. R. Co.* v. *Stude*, 346 U. S. 574 (1954). The railroad, pursuant to Iowa law, condemned certain land. It appealed the local sheriff's award of compensation to the Federal District Court, alleging diversity of citizenship and seeking to limit the award. This Court sustained a dismissal of the action: "The United States District Court . . . does not sit to review on appeal action taken administratively . . . in a state proceed-

ing. . . . The Iowa Code does not purport to authorize such an appeal, Congress has provided none by statute, and the Federal Rules of Civil Procedure make no such provision." *Id.*, at 581.

The District Court cited 28 U. S. C. § 1331 (a) (1976 ed., Supp. III) as the basis for its jurisdiction, but the present case does not "arise under" federal law. The proceedings before the DOTD, which the District Court purported to review, were grounded on La. Rev. Stat. Ann. § 38:3101 *et seq.* (West Supp. 1980). Although this state legislation is similar to the federal Act, and was enacted in response to 42 U. S. C. § 4630, it is nonetheless still a state law. Nothing in the federal Act gives displaced persons a direct cause of action against state agencies, nor does respondent cite any evidence in the legislative history suggesting that such an action was contemplated. On the contrary, the Act encourages States to make appropriate relocation payments under their own laws by conditioning the availability of federal funds on the provision of such payments. *Ibid.* The carrot of federal funds, not the stick of private suits, was chosen by Congress as the means of providing relocation payments to those displaced by the States for federally assisted projects.

Because the District Court assumed to the contrary, and exercised jurisdiction either to review the decision of the state agency or to entertain a direct action against the state agency, I would grant the petitioner agency's petition for certiorari.

No. 80–184. ILLINOIS *v.* DOWDELL. App. Ct. Ill., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 81 Ill. App. 3d 266, 401 N. E. 2d 295.

No. 80–185. KLIPPAN, GMBH *v.* VOLKSWAGEN OF AMERICA, INC. Sup. Ct. Alaska. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 611 P. 2d 498.

No. 80–224. WESTINGHOUSE ELECTRIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 618 F. 2d 107.

No. 80–305. ALABAMA DAIRY COMMISSION ET AL. *v.* DELVIEW MEADOW GOLD DIVISION, BEATRICE FOODS CO., ET AL. Sup. Ct. Ala. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 383 So. 2d 511.

No. 80–337. ROBERTS *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 617 F. 2d 460.

No. 80–263. ITHACA COLLEGE FACULTY ASSN., NYSUT–AFT *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 623 F. 2d 224.

No. 80-297. HOLDING *v.* BVA CREDIT CORP. ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 618 F. 2d 99.

No. 80–5248. INMATES, RICHMOND CITY JAIL *v.* WINSTON ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 622 F. 2d 584.

No. 80–405. TRAN CON CORP., DBA PALLADIUM *v.* ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD (RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 80–308. ORTHO PHARMACEUTICAL CORP. *v.* MCKENNA ET VIR. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 622 F. 2d 657.

No. 80–352. KALINSKY ET AL. *v.* GENERAL DYNAMICS CORP. ET AL. C. A. 9th Cir. Motion of California Trial Lawyers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 622 F. 2d 1315.

No. 80–5103. DOWNS *v.* FLORIDA. Sup. Ct. Fla.;

No. 80–5317. REDD *v.* BALKCOM, WARDEN. Sup. Ct. Ga.; and

No. 80–5359. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 80–5359, 597 S. W. 2d 358.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1245. ACAVINO *v.* UNITED STATES, 446 U. S. 951. Petition for rehearing denied.

NOVEMBER 5, 1980

Dismissal Under Rule 53

No. 80–5403. PRATT *v.* UNITED STATES. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53.

NOVEMBER 7, 1980

Dismissal Under Rule 53

No. 80–5526. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 627 F. 2d 1094.

NOVEMBER 10, 1980

Appeals Dismissed

No. 80–318. EXXON CORP. ET AL. *v.* CITY OF MENTOR, OHIO. Appeal from Ct. App. Ohio, Lake County, dismissed for want of substantial federal question.

No. 80–401. RUBIN ET UX. *v.* GLASER, DIRECTOR, DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 83 N. J. 299, 416 A. 2d 382.

No. 80–5427. ROBERTS *v.* McCOY ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 621 F. 2d 439.

No. 80–5528. CONRAD *v.* RODINO, MEMBER OF CONGRESS, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 80–5529. CONRAD *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Certiorari Granted—Affirmed in Part, Reversed in Part, and Remanded. (See No. 79–6000, *ante*, p. 5.)

Certiorari Granted—Vacated and Remanded

No. 80–365. WASHINGTON *v.* FITZSIMMONS. Sup. Ct. Wash. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Supreme Court of Washington to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE STEVENS dissent. Reported below: 93 Wash. 2d 436, 610 P. 2d 893.

Miscellaneous Orders

No. A–292. BIZZARD *v.* UNITED STATES. Application for bail and/or writ of habeas corpus, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–388. MCLAIN *v.* MEIER, SECRETARY OF STATE OF NORTH DAKOTA, ET AL. Application for stay and injunctive relief, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–196. IN RE DISBARMENT OF BROADWELL. It is ordered that Paul Herbert Broadwell of Phoenix, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–197. IN RE DISBARMENT OF CAMPBELL. It is ordered that William H. Campbell, of Omaha, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–201. IN RE DISBARMENT OF NOONAN. It is ordered that Francis Patrick Noonan, of Poolesville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–203. IN RE DISBARMENT OF HENDERSON. It is ordered that Alan Burton Henderson, of Towson, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–195. IN RE DISBARMENT OF CORY. It is ordered that Ernest Neal Cory, Jr., of Laurel, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–198. IN RE DISBARMENT OF FOGEL. It is ordered that Martin Fogel, of Rockville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–205. IN RE DISBARMENT OF SILASKI. It is ordered that George S. Silaski, of Kalamazoo, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–206. IN RE DISBARMENT OF KERPELMAN. It is ordered that Leonard Jules Kerpelman, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–207. IN RE DISBARMENT OF WALSH. It is ordered that Bernard Walsh, Jr., of Papillion, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 79–880. KISSINGER ET AL. *v.* HALPERIN ET AL. C. A. D. C. Cir. [Certiorari granted, 446 U. S. 951.] Motion of Bertram Zweibon et al. for leave to file a brief as *amici curiae* granted. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 447 U. S. 920.] Motions of International Union of Electrical, Radio & Machine Workers, AFL–CIO; Mary P. Laffey et al.; and American Federation of Labor and Congress of Industrial Organizations et al. for leave to file briefs as *amici curiae* granted. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 79–1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL;

No. 79–1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79–1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79–1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79–1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motions of National Association of Retarded Citizens et al. and plaintiffs in *Brewster* v. *Dukakis*, et al., for leave to participate in oral argument as *amici curiae* denied.

No. 79–1734. PARRATT ET AL. *v.* TAYLOR. C. A. 8th Cir. [Certiorari granted, *ante*, p. 917.] Motion of respondent for appointment of counsel granted, and it is ordered that Kevin Colleran, Esquire, of Lincoln, Neb., be appointed to serve as counsel for respondent in this case.

No. 80–419. ARIZONA *v.* MARICOPA COUNTY MEDICAL SOCIETY ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–704. GIBBONS, TRUSTEE, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 7th Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 80–5560. IN RE CORLEY. Petition for writ of habeas corpus denied.

No. 79–2016. IN RE INTERSIMONE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 80–84. ANDERSON BROS. FORD ET AL. *v.* VALENCIA ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 617 F. 2d 1278.

No. 80–5116. JENKINS *v.* BREWER. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 624 F. 2d 1106.

Certiorari Denied. (See also No. 80–5427, *supra.*)

No. 79–1524. CITIZENS CASUALTY COMPANY OF NEW YORK *v.* SLOTKIN ET AL.;

No. 79–1535. MCGRATH *v.* SLOTKIN ET AL.;

No. 79–1571. MCGRATH *v.* SLOTKIN ET AL.; and

No. 79–1719. AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON *v.* SLOTKIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 301.

No. 79–6663. TROZZO ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–6766. WARDEN *v.* KIDD, CIRCUIT COURT CLERK OF JEFFERSON COUNTY, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 308.

No. 79–6858. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 82.

No. 79–6872. THOMAS *v.* MUSKIE, SECRETARY OF STATE, ET AL.; and

No. 79–6873. THOMAS *v.* MUSKIE, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79–6899. CASON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 596 S. W. 2d 436.

No. 80–39. VOLZ *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 10th Cir. Certiorari denied. Reported below: 619 F. 2d 49.

No. 80–236. NEWMAN MEMORIAL HOSPITAL, INC., ET AL. *v.* HACKNEY, ADMINISTRATRIX. C. A. 10th Cir. Certiorari denied. Reported below: 621 F. 2d 1069.

No. 80–262. DACEY *v.* COTTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 573.

No. 80–368. FEDERAL ELECTION COMMISSION *v.* AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 97, 628 F. 2d 97.

No. 80–369. AVINS *v.* WHITE. C. A. 3d Cir. Certiorari denied. Reported below: 627 F. 2d 637.

No. 80–371. RAO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 964, 425 N. Y. S. 2d 888.

No. 80–374. REYNOLDS, DBA BEN'S AUTO SALES *v.* YAZZIE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 623 F. 2d 638.

No. 80–375. SHAMES *v.* SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO (SHAMES, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–376. BURDEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 105 Cal. App. 3d 917, 166 Cal. Rptr. 542.

No. 80–383. ADCOCK *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 292 N. W. 2d 878.

No. 80–394. SHRIVER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 632 P. 2d 420.

No. 80–397. LEE ET AL. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 397 N. E. 2d 1047.

No. 80–407. THOMPSON *v.* TURNER, ASSISTANT DIRECTOR, ALABAMA STATE HIGHWAY DEPARTMENT. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1259.

No. 80–409. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1108.

No. 80–411. MORSEBURG *v.* BALYON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 2d 972.

No. 80–424. RUSSELL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 227 Kan. 897, 610 P. 2d 1122.

No. 80–432. CITY OF NEWARK, NEW JERSEY, ET AL. *v.* NATURAL RESOURCES COUNCIL, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF NEW JERSEY, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 530, 414 A. 2d 1304.

No. 80–438. GRAYDON *v.* PASADENA REDEVELOPMENT AGENCY ET AL. (HAHN, INC., REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 631, 164 Cal. Rptr. 56.

No. 80–445. LIGONS *v.* BECHTEL POWER CORP. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 2d 771.

No. 80–453. ROBERTS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 80–457. WILSON *v.* FIRESTONE, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 345.

No. 80–460. MERLO ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–540. BROOKS *v.* SUPREME COURT OF SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 274 S. C. 601, 267 S. E. 2d 74.

No. 80–5073. CLAYTON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 565.

No. 80–5146. MIDDLEBROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 273.

No. 80–5150. CHAFIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 927.

No. 80–5237. WARD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 24 Wash. App. 761, 603 P. 2d 857.

No. 80–5304. SAMUELS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 1035, 409 N. E. 2d 1368.

No. 80–5328. PHIPPS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 1000.

No. 80–5337. GALADA *v.* GUILLEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 860.

No. 80–5344. MITCHELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 2d 158.

No. 80–5345. BROWN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 599 S. W. 2d 498.

No. 80–5346. SPRINGFIELD *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 96 Wis. 2d 740, 297 N. W. 2d 510.

No. 80–5352. DANIELS *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1089.

No. 80–5356. BLAKNEY *v.* SCHOOL DISTRICT OF PHILADELPHIA; and

No. 80–5357. BLAKNEY *v.* SCHOOL DISTRICT OF PHILADELPHIA. C. A. 3d Cir. Certiorari denied.

No. 80–5364. ENGLISH *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 297.

No. 80–5366. TONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 277.

No. 80–5369. HICKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5372. GUNN *v.* ANDERSON. C. A. 6th Cir. Certiorari denied.

No. 80–5375. GUSS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 80–5377. WILLIAMS *v.* HINTON. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 589.

No. 80–5378. BABERS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 178.

No. 80–5396. HEFFNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 80–5401. DANKERT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 392, 268 S. E. 2d 435.

No. 80–5420. CHOW *v.* SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 594.

No. 80–5474. DEGGENDORF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 47.

No. 80–5500. DEVINCENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 632 F. 2d 147.

No. 80–5509. JEWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1351.

No. 79–6715. CULBERSON *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 79–6862. STONE *v.* FLORIDA. Sup. Ct. Fla.;
No. 79–6884. FAIR *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–5119. MULLIGAN *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–5163. ESQUIVEL *v.* TEXAS. Ct. Crim. App. Tex.;
No. 80–5249. REDDIX *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 80–5399. JORDAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 79–6715, 379 So. 2d 499; No. 79–6862, 378 So. 2d 765; No. 79–6884, 245 Ga. 868, 268 S. E. 2d 316; No. 80–5119, 245 Ga. 266, 264 S. E. 2d 204; No. 80–5163, 595 S. W. 2d 516; No. 80–5249, 381 So. 2d 999; No. 80–5399, 126 Ariz. 283, 614 P. 2d 825.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 80–5523. FRASQUILLO-ZOMOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 99.

No. 80–5524. COURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 80–5527. HOSKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 295.

No. 80–5534. LEYBA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 627 F. 2d 1059.

No. 80–5535. GARCIA-ANGUIANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80–359. JOHNSON, FOR THE USE OF ROSSIELLO *v.* ALLSTATE INSURANCE CO. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 629 F. 2d 1244.

No. 80–502. FLOREY ET AL. *v.* SIOUX FALLS SCHOOL DISTRICT 49–5 ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 619 F. 2d 1311.

Rehearing Denied

No. 79–6410. JAMES *v.* UNITED STATES, *ante*, p. 846;

No. 79–6531. HALL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, *ante*, p. 892;

No. 79–6533. HUANG *v.* ROSEN ET AL., *ante*, p. 848;

No. 79–6892. BRYAN *v.* BYRD ET AL., *ante*, p. 868;

No. 80–5124. SHAW *v.* UNITED STATES, *ante*, p. 881;

No. 80–5166. LILLIBRIDGE, TRUSTEE, ET AL. *v.* UNITED STATES ET AL., *ante*, p. 883; and

No. 80–5218. MATTHEWS *v.* UNITED STATES, *ante*, p. 883. Petitions for rehearing denied.

NOVEMBER 17, 1980

Affirmed on Appeal

No. 80–333. TOWN OF SOUTHAMPTON *v.* TROYER ET AL. Affirmed on appeal from C. A. 2d Cir. For the reasons stated in his dissent in *Schaumburg* v. *Citizens for Better Environment,* 444 U. S. 620, 639 (1980), JUSTICE REHNQUIST would reverse the judgment of the Court of Appeals. Reported below: 628 F. 2d 1346.

Appeals Dismissed

No. 80–5263. BULLWINKLE *v.* CALIFORNIA; and

No. 80–5456. BULLWINKLE *v.* CALIFORNIA. Appeals from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 105 Cal. App. 3d 82, 164 Cal. Rptr. 163.

No. 80–5440. SHAO FEN CHIN, ADMINISTRATOR *v.* ST. LUKE'S HOSPITAL CENTER ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 50 N. Y. 2d 928.

Certiorari Granted—Reversed. (See No. 79–1895, *ante,* p. 33; and No. 80–321, *ante,* p. 39.)

Certiorari Granted—Vacated and Remanded

No. 79–6745. PATRICK *v.* GEORGIA;

No. 80–5010. HARDY *v.* GEORGIA; and

No. 80–5266. THOMAS *v.* GEORGIA. Sup. Ct. Ga. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Godfrey* v. *Georgia,* 446 U. S. 420 (1980). CHIEF JUSTICE BURGER, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE REHNQUIST dissent. Reported below: No. 79–6745, 245 Ga. 417, 265 S. E. 2d 553; No. 80–5010, 245 Ga. 272, 264 S. E. 2d 209; No. 80–5266, 245 Ga. 688, 266 S. E. 2d 499.

Vacated and Remanded After Certiorari Granted

No. 80-45. JOHNSON *v.* J. O. L. Ct. App. D. C. [Certiorari granted, *ante*, p. 818.] Judgment vacated and case remanded for further consideration in light of the position presently asserted by the respondent in his motion to dismiss filed October 27, 1980; the opposition filed thereto by petitioner on November 6, 1980; and the reply filed thereto by respondent on November 13, 1980.

Miscellaneous Orders

No. A-385. ZOBEL ET UX. *v.* WILLIAMS, COMMISSIONER OF REVENUE OF ALASKA, ET AL. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, granted. The mandate of the Supreme Court of Alaska is stayed pending the timely filing and disposition of the appeal. JUSTICE REHNQUIST dissents.

No. D-199. IN RE DISBARMENT OF FISCHER. It is ordered that Charles Fischer, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-202. IN RE DISBARMENT OF EASLER. It is ordered that William R. Easler, of Spartanburg, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-204. IN RE DISBARMENT OF SCHLATER. It is ordered that Donald E. Schlater, of Havertown, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–208. IN RE DISBARMENT OF NOREN. It is ordered that Donald H. Noren, of Plantation, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–209. IN RE DISBARMENT OF PATT. It is ordered that Seymour Harold Patt, of Reno, Nev., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–210. IN RE DISBARMENT OF BURKA. It is ordered that Leonard W. Burka, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–211. IN RE DISBARMENT OF BARBUTO. It is ordered that James Vito Barbuto, of Akron, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85, Orig. TEXAS *v.* OKLAHOMA. Motion of Texas Power & Light Co. for leave to intervene referred to the Special Master. [For earlier order herein, see 444 U. S. 1065.]

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 447 U. S. 920.] Motion of the Solicitor General for divided argument granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 79–1388. KIRCHBERG *v.* FEENSTRA ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 446 U. S. 917.] Motion of NOW Legal Defense and Education Fund et al. for leave to file a brief as *amici curiae* granted.

No. 79–1538. ANDRUS, SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL.; and

No. 79–1596. VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. D. C. W. D. Va. [Probable jurisdiction noted, *ante*, p. 817.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 80–5116. JENKINS *v.* BREWER. C. A. 7th Cir. [Certiorari granted, *ante*, p. 981.] Motion of petitioner for appointment of counsel granted, and it is ordered that John Seelig Elson, Esquire, of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 80–5385. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would vacate the death sentence in this case.

Certiorari Granted

No. 79–1517. FEDERATED DEPARTMENT STORES, INC., ET AL. *v.* MOITIE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 611 F. 2d 1267.

No. 80–348. H. A. ARTISTS & ASSOCIATES, INC., ET AL. *v.* ACTORS' EQUITY ASSN. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 622 F. 2d 647.

Certiorari Denied. (See also No. 80–5440, *supra.*)

No. 79–1830. HEISE *v.* VILLAGE OF PEWAUKEE. Sup. Ct. Wis. Certiorari denied. Reported below: 92 Wis. 2d 333, 285 N. W. 2d 859.

No. 79–1984. STRUBE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 274 Pa. Super. 199, 418 A. 2d 365.

No. 79–2009. LEVINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 429, 394 N. E. 2d 509.

No. 79–2019. KELLER, DISTRICT ATTORNEY FOR CLAYTON JUDICIAL CIRCUIT, STATE OF GEORGIA *v.* SEPTUM, INC. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 456.

No. 79–2078. SWARTOUT *v.* CIVIL SERVICE COMMISSION OF SPOKANE ET AL. Ct. App. Wash. Certiorari denied. Reported below: 25 Wash. App. 174, 605 P. 2d 796.

No. 80–68. STROUSE ET AL. *v.* CARTER, JUDGE. Sup. Ct. Okla. Certiorari denied.

No. 80–133. LEVITT & SONS OF PUERTO RICO, INC. *v.* COMMERCIAL INSURANCE CO. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80–142. HAYES *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 489 Pa. 419, 414 A. 2d 318.

No. 80–223. HOWE ET AL. *v.* ALLIED VAN LINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 1147.

No. 80–256. GLENN *v.* SHIPP ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 603.

No. 80–286. WOOTERS ET AL. *v.* JORNLIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 80–351. MAGNELLI *v.* PENNSYLVANIA ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 47 Pa. Commw. 597, 408 A. 2d 904.

No. 80–354. DRESSER INDUSTRIES, INC. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 345, 628 F. 2d 1368.

No. 80–362. FAUSNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 80–380. GREGORY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 626 F. 2d 11.

No. 80–391. AKERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1285.

No. 80–421. FOXMAN ET UX. *v.* RENISON. C. A. 2d Cir. Certiorari denied. Reported below: 625 F. 2d 429.

No. 80–425. NORTON ET AL. *v.* LEADVILLE CORP. Ct. App. Colo. Certiorari denied.

No. 80–426. SCHWARZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80–440. SIKORA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 1175.

No. 80–447. OLSEN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 293 N. W. 2d 216.

No. 80–464. DICKISON ET AL. *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–466. SORIANO *v.* MOORE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 783.

No. 80–469. SPEIRS ET AL. *v.* BANK OF NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 95 Nev. 870, 603 P. 2d 1074.

No. 80–473. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* EVANS, TEMPORARY ADMINISTRATRIX, ET AL. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 590 S. W. 2d 515.

No. 80–476. DEMARCO *v.* PENNSYLVANIA STATE BOARD OF MEDICAL EDUCATION AND LICENSURE. Pa. Commw. Ct. Certiorari denied. Reported below: 47 Pa. Commw. 500, 408 A. 2d 572.

No. 80–523. WALSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 623 F. 2d 489.

No. 80–536. SERAPHIM *v.* WISCONSIN ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 97 Wis. 2d 485, 294 N. W. 2d 485.

No. 80–587. STOTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 710.

No. 80–595. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 629 F. 2d 650.

No. 80–600. WITSCHNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 840.

No. 80–604. WALKER *v.* BARRY, MAYOR OF DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 82, 627 F. 2d 541.

No. 80–619. LONEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 212.

No. 80–626. GRAVETT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 768.

No. 80–634. FIELDS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 207.

No. 80–5022. WHITE *v.* BLOOM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 2d 276.

No. 80–5025. GALADA *v.* TICE. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 583.

No. 80–5067. SCOTT ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–5099. SILVA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 80–5108. EVELAND *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 80–5142. DAVIS *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 80–5162. EIGNER *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 583.

No. 80–5176. WILLIAMS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 383 So. 2d 564.

No. 80–5190. BERARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 723.

No. 80–5199. CARMEL *v.* UNITED STATES PAROLE COMMISSION. C. A. 2d Cir. Certiorari denied.

No. 80–5200. GRIFFIN *v.* STEPHENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 583.

No. 80–5253. KEZIAH *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 584.

No. 80–5349. MAULDIN *v.* GRANT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 303.

No. 80–5354. WELCH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 269 Ark. 208, 599 S. W. 2d 717.

No. 80–5371. NOE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 384 So. 2d 1046.

No. 80–5380. RODIC *v.* THISTLEDOWN RACING CLUB ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 736.

No. 80–5384. WOODARD *v.* WACHOVIA BANK & TRUST CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 864.

No. 80–5400. BEMBER *v.* CONNECTICUT. App. Sess., Super. Ct. Conn. Certiorari denied.

No. 80–5402. MCQUEEN *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 585 and 626 F. 2d 862.

No. 80–5406. JOHL *v.* PERKINS. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 743, 424 N. Y. S. 2d 807.

No. 80–5407. PATTERSON *v.* MERCER ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–5408. PETERS *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80–5412. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 124.

No. 80–5435. LARREA *v.* SMITH, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 204.

No. 80–5436. ROSENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5441. GROFT *v.* HUNTINGDON COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5443. MCCRAY *v.* BURRELL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 705.

No. 80–5459. BLACK *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1200.

No. 80–5462. BENJAMIN *v.* HOWARD, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5477. WHEELER *v.* DAVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1094.

No. 80–5507. ARTWAY *v.* DEL TUFO, UNITED STATES ATTORNEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5508. SNEED *v.* BRESSON, ACTING CHIEF, PRIVACY ACTS BRANCH, RECORDS MANAGEMENT DIV., U. S. DEPT. OF JUSTICE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 863.

No. 80–5519. DUGGER ET AL. *v.* VANDEVER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1089.

No. 80–5542. MANGRUM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 418 A. 2d 1071.

No. 80–5543. CHRISTENSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80–5544. GUERRIERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80–5553. KAISER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1095.

No. 80–5568. LEDESMA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 632 F. 2d 670.

No. 80–5579. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 2d 883.

No. 79–1834. COCA-COLA BOTTLING COMPANY OF MEMPHIS *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and COCA-COLA BOTTLING COMPANY OF MEMPHIS *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 1196. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 616 F. 2d 949 (first case); 615 F. 2d 1360 (second case).

No. 79–6341. MARTIN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 376 So. 2d 300.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

JUSTICE STEWART, dissenting.

The Louisiana jury that imposed the death penalty upon the petitioner found two aggravating circumstances: (1) the petitioner had knowingly created a risk of death or great bodily harm to more than one person; and (2) he had committed the offense in an especially heinous, atrocious, or cruel manner. 376 So. 2d 300, 311–312. In affirming the death

sentence, the Louisiana Supreme Court held that the jury had properly found the first aggravating circumstance. *Id.*, at 312. It then reasoned that since the jury had had the power to sentence the petitioner to death on the basis of a single aggravating circumstance, there was no need for it to review the correctness of the jury's finding of the second aggravating circumstance. *Ibid.*

Under the state death penalty statute, however, while the jury was permitted to impose capital punishment where it found only a single aggravating circumstance, it was not required to do so. La. Code Crim. Proc. Ann., Art. 905.3 (West Supp. 1980). The Louisiana court's reasoning, therefore, ignores the possibility that some of the jurors may have voted for the death sentence because of the existence of the second aggravating circumstance alone, or that others may have voted for the death penalty only because of the existence of the two aggravating circumstances.

The jury's verdict thus makes it impossible to determine whether some or all of the jurors may have relied on the existence of the second aggravating circumstance in reaching their decision to impose the sentence of death. Accordingly, I would grant the petition for certiorari, vacate the judgment of the Louisiana Supreme Court, and remand this case to that court for consideration of the validity of the jury's finding of the second aggravating circumstance. *Stromberg* v. *California*, 283 U. S. 359, 368.

No. 79–6615. DRAKE *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County; and

No. 79–6704. WESTBROOK *v.* BALKCOM, WARDEN. Sup. Ct. Ga. Certiorari denied.

JUSTICE STEVENS, concurring.

After our decision in *Godfrey* v. *Georgia*, 446 U. S. 420, the Supreme Court of Georgia, in cases remanded by this Court for further consideration in light of *Godfrey*, decided to ad-

here to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established by proof beyond a reasonable doubt, will not be set aside simply because one of those aggravating circumstances is vulnerable. See, *e. g., Hamilton* v. *State*, 246 Ga. 264, 271 S. E. 2d 173 (1980); *Brooks* v. *State*, 246 Ga. 262, 271 S. E. 2d 172 (1980); *Collins* v. *State*, 246 Ga. 261, 271 S. E. 2d 352 (1980).* Because the Georgia Supreme Court's position is clear, and because I consider it consistent with this Court's decisions, I think the Court has correctly decided to deny certiorari in both No. 79–6704 and No. 79–6615, even though similar cases were remanded to the Georgia Supreme Court for reconsideration immediately after we decided *Godfrey*.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428

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*In *Brooks*, the Georgia Supreme Court stated:

"Having reconsidered the facts of the present case as directed, this court now reaffirms on two, independent grounds, the appellant's sentence of death for the murder of Carol Jeannine Galloway.

"First, in the present case, the jury's verdict for the death sentence was predicated, not only on Code Ann. § 27–2534.1 (b)(7), but also on Code Ann. § 27–2534.1 (b)(2) (the jury found, beyond a reasonable doubt, that the murder was committed during the appellant's commission of a rape and an armed robbery).

" 'Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon.' Gates v. State, 244 Ga. 587, 599 (261 SE 2d 349) (1979).

"Therefore, we reaffirm the appellant's sentence of death on the ground that the jury's finding of Code Ann. § 27–2534.1 (b)(2) was supported by legally sufficient evidence." 246 Ga., at 263, 271 S. E. 2d, at 172–173. Justice Hill concurred only on the basis of the *Gates* rationale. *Ibid.*

U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

JUSTICE STEWART, dissenting.

I would grant the petition for certiorari in No. 79–6615, vacate the judgment insofar as it approved the imposition of the death sentence, and remand the case for reconsideration. See *Martin* v. *Louisiana, ante,* p. 998 (STEWART, J., dissenting).

I would vacate the judgment of the Supreme Court of Georgia in No. 79–6704, insofar as it left undisturbed the death penalty, and remand the case to that court for further consideration in light of *Godfrey* v. *Georgia,* 446 U. S. 420 (1980).

The sentence of death was imposed in No. 79–6704 upon the basis of the statutory aggravating circumstance involved in the *Godfrey* case (Ga. Code § 27–2534.1 (b)(7) (1978)), and an additional statutory aggravating circumstance. If, after *Godfrey,* the Supreme Court of Georgia should decide that the § (b)(7) aggravating circumstance could not constitutionally justify the death sentence, Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance. Under Georgia's capital sentencing scheme, the trial court is the sentencing authority. Ga. Code §§ 27–2503 (b), 27–2534.1 (b) (1978). In addition, the sentencer has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. See *Fleming* v. *State,* 240 Ga. 142, 146–147, 240 S. E. 2d 37, 40–41 (1977); *Hawes* v. *State,* 240 Ga. 327, 334–335, 240 S. E. 2d 833, 839 (1977). See also *Gregg* v. *Georgia,* 428 U. S. 153, 203. Thus, under Georgia's capital punishment scheme, only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death.

I had thought that it was on the basis of precisely this reasoning that the Court only months ago unanimously acted as it did with respect to four cases which were, in all relevant respects, indistinguishable from this one. See *Davis* v. *Georgia*, 446 U. S. 961; *Collins* v. *Georgia*, 446 U. S. 961; *Baker* v. *Georgia*, 446 U. S. 961; *Hamilton* v. *Georgia*, 446 U. S. 961.

JUSTICE WHITE, dissenting.

I dissent from the denial of certiorari in these cases. I would vacate the judgment in each case insofar as it affirmed the imposition of the death sentence and would remand for reconsideration in light of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). The judgment in each case was entered prior to our decision in *Godfrey*. In each case, the jury found two statutory aggravating circumstances which permit imposition of the death penalty under Georgia law, one of which was that involved in *Godfrey*. In each case the Georgia Supreme Court sustained both circumstances in its mandatory review of the sentence.

We have remanded such cases before, and we should do so now. This would allow the Georgia Supreme Court in the first instance to determine whether the death penalty should be sustained without regard to the validity of the *Godfrey* circumstance. I would not make that determination here, as the Court is apparently doing; for I do not understand the Georgia cases cited by JUSTICE STEVENS to hold either that the Georgia Supreme Court is without power to set aside a death penalty if it sustains only one of the aggravating circumstances found by the jury or that, although the court has that power, it invariably will not disturb the death penalty in such situations. Of course, the Georgia Supreme Court could avoid any such question if on remand it found sufficient grounds to sustain the *Godfrey* aggravating circumstance.

Nor do I believe that the Constitution requires the Georgia Supreme Court to vacate the sentences if it fails to sustain the *Godfrey* aggravating circumstance. The cases now before us involve only sentencing, not guilt or innocence, and there is no constitutional right to jury sentencing. The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either *Stromberg* v. *California*, 283 U. S. 359 (1931), or *Street* v. *New York*, 394 U. S. 576 (1969). The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.

No. 80–5216. SCOTT *v.* FLORIDA. Sup. Ct. Fla.;

No. 80–5335. JONES *v.* MISSISSIPPI. Sup. Ct. Miss.; and

No. 80–5495. RUSSELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 80–5335, 381 So. 2d 983; No. 80–5495, 598 S. W. 2d 238.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 80–273. HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 4th Cir. Motions of Sierra Club et al. and Bair Island Investments, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 621 F. 2d 1281.

No. 80–329. SMITH *v.* MCCRAY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 622 F. 2d 705.

No. 80–201. SILVER CREEK PACKING CO. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 9th Cir. Motion of Nisei Farmers League for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 615 F. 2d 848.

No. 80–488. MASSACHUSETTS *v.* BRANT. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 380 Mass. 876, 406 N. E. 2d 1021.

No. 80–506. KAPLAN *v.* POINTER ET AL. C. A. D. C. Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 80–477. AD HOC '78 ET AL. *v.* ROUSE PHILADELPHIA, INC., ET AL. Super. Ct. Pa. Motion of American Civil Liberties Foundation of Pennsylvania for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 275 Pa. Super. 54, 417 A. 2d 1248.

No. 80–5172. COLE *v.* STEVENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 1055.

No. 80–5350. FRYBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 622 F. 2d 1010.

Rehearing Denied

No. 79–1530. TOWN *v.* RENO, STATE ATTORNEY OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL., *ante*, p. 803;

No. 79–1889. RIVERA *v.* OREGON STATE EMPLOYEES ASSN. ET AL., *ante*, p. 803;

No. 79–6458. JOHNSON *v.* CITY OF BIRMINGHAM, ALABAMA, *ante*, p. 846; and

No. 79–6506. COVINO *v.* MORRIS, WARDEN, ET AL., *ante*, p. 847. Petitions for rehearing denied.

No. 79–6585. STEVENS *v.* GEORGIA, *ante*, p. 891;

No. 79–6785. PRATER *v.* BROWN, *ante*, p. 862;

No. 80–5016. KEY *v.* BOARD OF VOTER REGISTRATION OF CHARLESTON COUNTY ET AL., *ante*, p. 877;

No. 80–5029. JAUDON *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 878;

No. 80–5082. TILLI *v.* CAPABIANCO ET AL., *ante*, p. 880; and

No. 80–5177. WADE *v.* FRANKLIN STRICKLIN LAND SURVEYORS, INC., *ante*, p. 883. Petitions for rehearing denied.

NOVEMBER 25, 1980

Miscellaneous Order

No. A–453. MISSOURI KANSAS TEXAS RAILROAD CO. *v.* UNITED STATES ET AL. The order heretofore entered by JUSTICE POWELL on November 21, 1980, at 7 p. m., is vacated and the application for stay presented to JUSTICE POWELL, and by him referred to the Court, is denied. The application, filed November 22, 1980, at 12:05 p. m., for an order enjoining the effectiveness of the merger between Burlington Northern Inc. and St. Louis-San Francisco Railroad Co., is denied. Treating the application for a temporary stay as an application for stay of the judgment of the United States Court of Appeals for the Fifth Circuit pending the timely filing and disposition of a petition for writ of certiorari, the application for stay is denied. JUSTICE MARSHALL took no part in the consideration or decision of this order.

DECEMBER 1, 1980

Appeal Dismissed

No. 80–422. TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION ET AL. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal ques-

tion. JUSTICE BRENNAN and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 490 Pa. 207, 415 A. 2d 413.

Miscellaneous Orders

No. A–409. PFAFF ET AL. *v.* WELLS, SHERIFF. Application for enlargement from custody pending appeal, addressed to JUSTICE MARSHALL and referred to the Court, denied. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. A–426. CUARON ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ET AL. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. D–171. IN RE DISBARMENT OF GARCIA. Disbarment entered. [For earlier order herein, see 444 U. S. 894.]

No. D–183. IN RE DISBARMENT OF BARNES. Disbarment entered. [For earlier order herein, see 444 U. S. 1029.]

No. D–184. IN RE DISBARMENT OF CAIN. Disbarment entered. [For earlier order herein, see 444 U. S. 1042.]

No. D–187. IN RE DISBARMENT OF WOLK. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D–189. IN RE DISBARMENT OF MANN. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D–200. IN RE DISBARMENT OF MCMAHON. It is ordered that Joseph R. McMahon, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–212. IN RE DISBARMENT OF GROSS. It is ordered that Nelson G. Gross, of Saddle River, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–213. IN RE DISBARMENT OF HALVERSON. It is ordered that John Byron Halverson, of Yorba Linda, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. The amended answer to the bill of complaint is referred to the Special Master. [For earlier order herein, see, *e. g.*, 441 U. S. 902.]

No. 78–1577. SEARS, ROEBUCK & Co. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 444 U. S. 823.] Motion of petitioner for leave to file a supplemental brief after argument granted. JUSTICE STEWART and JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 79–1429. AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 817.] Motion of American Iron & Steel Institute for leave to file a brief as *amicus curiae* granted.

No. 79–1944. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. [Certiorari granted, *ante*, p. 819.] Motion of Vanco Beverage, Inc., for leave to file a brief as *amicus curiae* granted.

No. 79–6853. WEBB *v.* WEBB. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 819.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion of J. Reese Franklin, Esquire, and W. S. Perry, Esquire, to withdraw as counsel for respondent granted. Motion of respondent for appointment of counsel granted, and it is ordered that Manley F. Brown, Esquire, of Macon, Ga., be appointed to serve as counsel for respondent in this case.

No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 820.] Motions of Mountain States Legal Foundation, Salt River Project Agricultural Improvement and Power District et al., and Shell Oil Co. et al. for leave to file briefs as *amici curiae* granted. Motion of petitioners for divided argument granted. Request for additional time for oral argument denied. JUSTICE STEWART took no part in the consideration or decision of these motions.

No. 80–54. ITT GILFILLAN *v.* CLAYTON; and

No. 80–5049. CLAYTON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 950.] Motion for appointment of counsel granted, and it is ordered that John T. McTernan, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for Clifford E. Clayton in these cases. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 80–503. KING, CHIEF, FAIRFAX COUNTY POLICE DEPARTMENT, ET AL. *v.* WALLACE ET AL. C. A. 4th Cir. Motion of respondents to consolidate this case with No. 79–6777, *Steagald* v. *United States* [certiorari granted, *ante*, p. 819], denied.

No. 80–532. FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ET AL. *v.* FLORIDA NURSING HOME ASSN. ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–781. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, CLC, ET AL. *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 3d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied. JUSTICE STEWART and JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 80–5574. IN RE RAINES. Petition for writ of habeas corpus denied.

No. 80–5502. IN RE JOHNSON. Petition for writ of mandamus denied.

No. 80–738. IN RE PENNHURST PARENTS-STAFF ASSN. Petition for writ of mandamus and prohibition and other relief denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

Probable Jurisdiction Noted

No. 80–251. ROSTKER, DIRECTOR OF SELECTIVE SERVICE *v.* GOLDBERG ET AL. Appeal from D. C. E. D. Pa. Motion of Stacey Acker et al. for leave to intervene denied. Probable jurisdiction noted. Reported below: 509 F. Supp. 586.

Certiorari Granted

No. 80–242. HIDALGO, SECRETARY OF THE NAVY *v.* NAKSHIAN. C. A. D. C. Cir. Certiorari granted. Reported below: 202 U. S. App. D. C. 59, 628 F. 2d 59.

No 80–493. UNITED STATES DEPARTMENT OF EDUCATION *v.* SEATTLE UNIVERSITY. C. A. 9th Cir. Certiorari granted. Reported below: 621 F. 2d 992.

Certiorari Denied

No. 79–6806. MENZIES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–6846. CREACH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 79 Ill. 2d 96, 402 N. E. 2d 228.

No. 80–25. BARRY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80–50. MCDONALD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 597 S. W. 2d 365.

No. 80–151. ALTUS NEWSPAPERS, INC., DBA ALTUS TIMES DEMOCRAT, ET AL. *v.* AKINS. Sup. Ct. Okla. Certiorari denied. Reported below: 609 P. 2d 1263.

No. 80–167. WRIGHTING *v.* APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–191. CARLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 518.

No. 80–221. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 631 F. 2d 81.

No. 80–222. CUSTER ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 224 Ct. Cl. 140, 622 F. 2d 554.

No. 80–226. JACKSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 781.

No. 80–258. SEKAQUAPTEWA *v.* MACDONALD; and
No. 80–265. MACDONALD *v.* SEKAQUAPTEWA. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 801.

No. 80–277. CALLOW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–320. COSTELLO *v.* BOARD OF APPEALS OF THE TOWN OF CONCORD. Ct. App. Mass. Certiorari denied. Reported below: 9 Mass. App. 477, 402 N. E. 2d 100.

No. 80–342. WOOD WALKER & CO. *v.* MARBURY MANAGEMENT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 705.

No. 80–358. STRICOF *v.* STRICOF. Ct. App. Mich. Certiorari denied.

No. 80–366. GREAT LAKES INTERNATIONAL, INC. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL.; and

No. 80–549. JACKMAN & CO. ET AL. *v.* GREAT LAKES INTERNATIONAL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 203.

No. 80–372. MITCHELL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 399; 268 S. E. 2d 360.

No. 80–389. COASTAL PETROLEUM CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 701, 524 F. 2d 1206.

No. 80–390. SMITH *v.* DAWS, POSTMASTER, MIAMI, FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1069.

No. 80–393. WALLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–395. MINYE *v.* UNIVERSITY OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1100.

No. 80–398. PIAMBINO ET AL. *v.* SYLVA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 1306.

No. 80–399. CONFORTE ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 869.

No. 80–400. WENINGER *v.* UNITED STATES C. A. 10th Cir. Certiorari denied. Reported below: 624 F. 2d 163.

No. 80–412. GOOD HOPE REFINERIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 57.

No. 80–423. CHISM *v.* NORFOLK & WESTERN RAILWAY CO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–449. IN RE WALTER STRAUS & SON, INC. C. A. 5th Cir. Certiorari denied.

No. 80–450. CARNEY ET UX. *v.* AHMANSON TRUST CO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–463. DOMINION TOOL & DIE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 623 F. 2d 484.

No. 80–467. HOLMES *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 418 A. 2d 142.

No. 80–468. PRECES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 378 So. 2d 77.

No. 80–481. KALMANOVITZ *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 28, 629 F. 2d 62.

No. 80–489. DUZAC *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 911.

No. 80–491. BURLESON *v.* HOWARD. Ct. App. D. C. Certiorari denied.

No. 80–501. GUTI ET AL. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 25 Wash. App. 1043.

No. 80–504. LAUFGAS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–505. ARLINGHAUS, EXECUTRIX *v.* RITENOUR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 629.

No. 80–507. RAHIN ET UX. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–508. NICOLETTE ET AL. *v.* BLOCH, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–509. MONGIELLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 807, 429 N. Y. S. 2d 338.

No. 80–512. BALTIMORE COUNTY, MARYLAND *v.* RAYMOND INTERNATIONAL BUILDERS, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 247, 412 A. 2d 1296.

No. 80–514. LOCAL UNION NO. 137, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* FRITO-LAY, INC. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1354.

No. 80–517. JUNEAU SQUARE CORP. ET AL. *v.* FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 798.

No. 80–520. JARVILL ET AL. *v.* CITY OF EUGENE ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 157, 613 P. 2d 1.

No. 80–522. FIRST AMERICAN NATIONAL BANK OF NASHVILLE *v.* SCARBORO. C. A. 6th Cir. Certiorari denied. Reported below: 619 F. 2d 621.

No. 80–524. RUSSELL ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 80–525. BUSCHMANN *v.* UNITED NEW YORK SANDY HOOK PILOTS' ASSN. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 1041, 410 N. E. 2d 747.

No. 80–531. SCHNEIDER *v.* BOWES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80–534. ADLER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 730, 409 N. E. 2d 888.

No. 80–546. STUDIENGESELLSCHAFT KOHLE M.B.H., TRUSTEE *v.* EASTMAN KODAK CO. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1315.

No. 80–555. COTA *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 105 Cal. App. 3d 282, 164 Cal. Rptr. 323.

No. 80–563. PREMO PHARMACEUTICAL LABORATORIES, INC., ET AL. *v.* ELI LILLY & CO. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 120.

No. 80–564. DUPLANTIS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 388 So. 2d 751.

No. 80–579. CARDEN ET UX. *v.* MONTANA. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 82.

No. 80–638. SEIDMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1222.

No. 80–641. KALMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–645. BURGIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 1352.

No. 80–647. PIERCE ET AL. *v.* NECA–IBEW WELFARE TRUST FUND. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 589.

No. 80–656. APPLING COUNTY, GEORGIA, ET AL. *v.* MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 1301.

No. 80–679. DELGADO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 294.

No. 80–687. CLAFLIN *v.* CLAFLIN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 82 Ill. App. 3d 246, 402 N. E. 2d 673.

No. 80–696. AMERICAN TRANSFER & STORAGE CO. *v.* BROWN. Sup. Ct. Tex. Certiorari denied. Reported below: 601 S. W. 2d 931.

No. 80–701. THOMPSON *v.* UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5011. BROWER *v.* UNITED STATES; and
No. 80–5023. MARINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 76.

No. 80–5048. BURBANK *v.* WARDEN, ILLINOIS STATE PENITENTIARY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 80–5143. MOLINARIO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 384 So. 2d 759.

No. 80–5169. BROWN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 96 Wis. 2d 238, 291 N. W. 2d 528.

No. 80–5171. HUDSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 382 So. 2d 479.

No. 80–5189. KLIMAS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 94 Wis. 2d 288, 288 N. W. 2d 157.

No. 80–5194. TURNER *v.* YOUNG. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 587.

No. 80–5279. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 587.

No. 80–5305. SAVAGE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 673, 409 N. E. 2d 858.

No. 80–5325. TURPIN *v.* CITY OF WEST HAVEN. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 196.

No. 80–5394. WOODS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 195.

No. 80–5414. MAGEE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5417. INDORATO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 711.

No. 80–5423. PONTICELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 985.

No. 80–5424. SMITH *v.* SHOEMAKER, CHIEF, ADULT PROBATION AUTHORITY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–5425. FARIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–5426. BASTIAN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 297.

No. 80–5430. MAPLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5439. MIDDLETON *v.* NELSON. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 80–5442. FORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. 1007, 265 S. E. 2d 729.

No. 80–5444. SWEETWINE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 288 Md. 199, 421 A. 2d 60.

No. 80–5446. WILLIAMS *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 628 F. 2d 934.

No. 80–5448. EVERETTE *v.* STEPHENSON. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 860.

No. 80–5449. HENDERSON, AKA COLLIER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 387 So. 2d 93.

No. 80–5450. ABU-BAKR *v.* ROWE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1107.

No. 80–5455. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1096.

No. 80–5458. CAVEGN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 294 N. W. 2d 717.

No. 80–5460. FRANKLIN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 80–5461. WILLIAMS, AKA MTHAWABU *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 385 So. 2d 214.

No. 80–5464. MAINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5465. NICKENS *v.* WHITE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 622 F. 2d 967.

No. 80–5473. GUYNN *v.* JEFFERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 860.

No. 80–5476. GORNICK *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–5479. HUNTER *v.* ELLIS, JUDGE. Sup. Ct. Ore. Certiorari denied.

No. 80–5480. ALBERTI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 77 App. Div. 2d 602, 430 N. Y. S. 2d 6.

No. 80–5482. STOKELEY ET AL. *v.* SMITH, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 80–5487. MILLER ET AL. *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1100.

No. 80–5493. LEVASSEUR *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: 1 Haw. App. 19, 613 P. 2d 1328.

No. 80–5496. OLIVENCIA *v.* CAMPBELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 291.

No. 80–5497. THOMAS *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5501. CHESTNUT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 14, 409 N. E. 2d 958.

No. 80–5505. WINSTEAD *v.* ROGERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1095.

No. 80–5512. DANKERT *v.* CLERK, SUPERIOR COURT, COBB COUNTY, GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5513. MCNEAL *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5515. PETERSON *v.* PETERSON. Sup. Ct. Minn. Certiorari denied.

No. 80–5521. BRADLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 939, 429 N. Y. S. 2d 48.

No. 80–5532. MAHL *v.* BOARD OF TRUSTEES OF FIRE FIGHTERS PENSION AND RELIEF FUND FOR THE CITY OF NEW ORLEANS. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1015.

No. 80–5536. HESELIUS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–5537. JONES *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied.

No. 80–5539. GRINAN *v.* GIEGOLD. C. A. 3d Cir. Certiorari denied.

No. 80–5541. WRIGHT *v.* ZAHRADNICK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 513.

No. 80–5545. HARRIS *v.* OPENHAUS ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5546. MARTINEZ *v.* ROMERO. C. A. 10th Cir. Certiorari denied. Reported below: 626 F. 2d 807.

No. 80–5549. ANDREWS *v.* ROBERTSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5550. SHEHADEH *v.* GREEN HOTELS, INC., ET AL. Ct. App. D. C. Certiorari denied.

No. 80–5552. WOODWARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 80–5558. GARDNER *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 600 S. W. 2d 614.

No. 80–5559. BREEST *v.* PERRIN, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 624 F. 2d 1112.

No. 80–5583. PORRES DE RICO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80–5592. WILLIAMS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–5593. URIBE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5594. PELCZARSKI *v.* SOUTHEASTERN BANK & TRUST CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80–5607. STONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 909.

No. 80–5611. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 697.

No. 80–5614. SMITH *v.* KEOHANE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5619. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1013.

No. 80–5621. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 218.

No. 80–5628. CROWHURST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 2d 1297.

No. 80–5630. ACEVEDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 2d 68.

No. 80–5642. RADA-SOLANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 577.

No. 80–5649. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 2d 161.

No. 80–5655. MCCRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 79–1385. DUVAL COUNTY RANCH CO., INC., ET AL. *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below 604 F. 2d 976.

No. 80–311. ARTHUR ANDERSEN & CO. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 623 F. 2d 720.

No. 80–346. VIRGINIA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 1018.

No. 80–378. CHRYSLER CORP. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 203 U. S. App. D. C. 283, 631 F. 2d 865.

No. 79–2032. STARLING *v.* BEARD ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 613 F. 2d 312.

No. 80–435. VALTEK, INC., ET AL. *v.* CONTROL COMPONENTS, INC., ET AL. C. A. 5th Cir. Motion of Patent Law Association of Chicago for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 609 F. 2d 763 and 616 F. 2d 892.

No. 80–511. GENERAL ELECTRIC CO. *v.* CURTISS-WRIGHT CORP. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 624 F. 2d 1089.

No. 80–554. COHN ET AL. *v.* NATIONAL BROADCASTING CO., INC., ET AL. Ct. App. N. Y. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 50 N. Y. 2d 885, 408 N. E. 2d 672.

No. 80–519. NELSON OIL CO., INC. *v.* SHELL OIL CO. Temp. Emerg. Ct. App. Motion of Independent Terminal Operators Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 627 F. 2d 228.

No. 80–556. CENTRAL LIQUOR CO. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE dissents from the denial of certiorari because the judgment below is in conflict with the judgments of other Courts of Appeals. *E. g., United States* v. *Alessi,* 536 F. 2d 978 (CA2 1976), and *United States* v. *Griffin,* 617 F. 2d 1342 (CA9 1980). Reported below: 628 F. 2d 1264.

No. 80–561. CONTROL DATA CORP. *v.* POTTER INSTRUMENT CO. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE dissents from the denial of certiorari because the judgment below is in conflict with the judgments of other Courts of Appeals. *E. g., Martinez* v. *Trainor,* 556 F. 2d 818, 821 (CA7 1977); *Jusino* v. *Morales & Tio,* 139 F. 2d 946 (CA1 1944); *Virginia Land Co.* v. *Miami Shipbuilding Corp.,* 201 F. 2d 506 (CA5 1953).

No. 80–543. NEW YORK *v.* HOWARD. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 50 N. Y. 2d 583, 408 N. E. 2d 908.

No. 80–5134. GORMLEY *v.* DIRECTOR, CONNECTICUT STATE DEPARTMENT OF ADULT PROBATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 938.

JUSTICE WHITE, dissenting.

Under Connecticut law, a person is guilty of a misdemeanor when "with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." Conn. Gen. Stat. § 53a–183 (a)(3) (1975 rev.). Petitioner was convicted of violating this statute after she made a telephone call to a woman with whom she had some personal quarrel. Following an unsuccessful direct appeal in the state courts,[1] petitioner brought a federal habeas corpus action arguing that under the First and Fourteenth Amendments the statute was unconstitutionally overbroad. The Court of Appeals for the Second Circuit found no constitutional infirmity. The petition for certiorari challenges that judgment.

To be sure, a State has a valid interest in protecting its citizens against unwarranted invasions of privacy. *Rowan* v. *Post Office Department*, 397 U. S. 728 (1970). See generally Note, Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 Hastings Const. L. Q. 129 (1979). This is especially true when unprotected speech, such as obscenity or threats of physical violence, is involved. But it is equally clear that a State may not pursue these interests by unduly infringing on what would

[1] On direct appeal in the state courts, the First Amendment argument presented here was raised in and rejected by the Appellate Session of the Superior Court, *State* v. *Anonymous*, 34 Conn. Supp. 689, 389 A. 2d 1270, appeal denied, 174 Conn. 803, 382 A. 2d 1332 (1978).

otherwise be protected speech. It is therefore critical to recall that speech may be "annoying" without losing its First Amendment protection [2] and that the Connecticut statute on its face criminalizes any telephone call that annoys and was intended to do so. It is not difficult to imagine various clearly protected telephone communications that would fall within the ban of the Connecticut statute.[3] As such it is fairly arguable that the statute is substantially overbroad and hence unconstitutional. *Lewis* v. *New Orleans*, 415 U. S. 130 (1974); *Gooding* v. *Wilson*, 405 U. S. 518 (1972).[4]

Beyond the obvious tension between our prior cases and the judgment below is the difference in opinion among those courts that have considered constitutional challenges to similar state statutes. Contrary to the decision reached by the

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[2] *Norwell* v. *Cincinnati*, 414 U. S. 14 (1973); *Coates* v. *Cincinnati*, 402 U. S. 611, 615–616 (1971). See *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

[3] For example, the Supreme Court of Illinois found that a similar statute risked criminal prosecution for a variety of situations involving protected speech.

"Conceivably, this section could make criminal a single telephone call made by a consumer who wishes to express his dissatisfaction over the performance of a product or service; a call by a businessman disturbed with another's failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters." *People* v. *Klick*, 66 Ill. 2d 269, 274, 362 N. E. 2d 329, 331–332 (1977).

[4] Given that the overbreadth may be substantial, petitioner has standing to raise the First Amendment claim even if the words she used were unprotected threats of violence. *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973). Furthermore, the case was submitted to the jury under an instruction which would have permitted a conviction if petitioner was found to have made *either* an annoying or threatening call with the requisite intent. The general verdict did not reveal on what ground the conviction rested. Even assuming that the facts could have supported a guilty verdict based on petitioner's unprotected speech, petitioner may have been convicted for making a merely annoying communication.

Court of Appeals in this case, state appellate courts have invalidated substantially equivalent provisions as being unconstitutionally overbroad. *People* v. *Klick*, 66 Ill. 2d 269, 362 N. E. 2d 329 (1977) (invalidating statute making it a crime for anyone who "[w]ith intent to annoy another, makes a telephone call, whether or not conversation thereby ensues"); *State* v. *Dronso*, 90 Wis. 2d 149, 279 N. W. 2d 710 (Ct. App. 1979) (same). Another court has invalidated a like statute on the grounds that it was unconstitutionally vague. *State* v. *Blair*, 287 Ore. 519, 601 P. 2d 766 (1979) (statute made it a crime to communicate by telephone "in a manner likely to cause annoyance or alarm" to the receiver). On the other hand, various state courts, like the Connecticut court in this case, have rejected overbreadth challenges to telephone harassment statutes. See, *e. g.*, *State* v. *Elder*, 382 So. 2d 687 (Fla. 1980) (statute prohibiting a person from making a telephone call "whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number"); *Constantino* v. *State*, 243 Ga. 595, 255 S. E. 2d 710 (1979) (prohibiting repeated telephoning "for the purpose of annoying, harassing or molesting another or his family"). See generally *United States* v. *Lampley*, 573 F. 2d 783 (CA3 1978); *People* v. *Smith*, 89 Misc. 2d 789, 392 N. Y. S. 2d 968 (1977). The above cases demonstrate that the state courts are not in agreement concerning application of First Amendment principles in this area of the law.

The foregoing suggests that even if the Court is of the view that the judgment below is correct, there is sufficient reason to grant certiorari and issue a judgment to this effect. Accordingly, I dissent.

No. 80–5463. MARTIN-TRIGONA *v.* GOULETAS ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 634 F. 2d 354.

Rehearing Denied

No. 79–1410. DUPART ET AL. *v.* LOUISIANA, *ante*, p. 820;

No. 79–1704. GRCICH *v.* JOGODA ET AL., *ante*, p. 823;

No. 79–1732. HILTON, AKA MILTON, ET AL. *v.* UNITED STATES, *ante*, p. 887;

No. 79–1737. OGLE *v.* UNITED STATES, *ante*, p. 825;

No. 79–1804. GARCIA-JARAMILLO *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 828;

No. 79–1815. SALOB *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL., *ante*, p. 829;

No. 79–1836. FOWLER ET UX. *v.* GENERAL DEVELOPMENT CORP., *ante*, p. 830;

No. 79–1863. HARPER ET AL. *v.* UNITED STATES, *ante*, p. 887;

No. 79–1876. BLAKE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 832;

No. 79–1902. ROSENBAUM *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 833;

No. 79–1934. DANIELS *v.* SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT ET AL., *ante*, p. 835;

No. 79–1961. BEARCE, ADMINISTRATOR, ET AL. *v.* UNITED STATES, *ante*, p. 837;

No. 79–1965. COUNTY OF LOS ANGELES ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL., *ante*, p. 837;

No. 79–1992. LAVELLE *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL., *ante*, p. 840;

No. 79–2057. POWELL *v.* NIGRO, *ante*, p. 843;

No. 79–2058. SILVERNAIL *v.* WASHINGTON, *ante*, p. 843;

No. 79–2071. SCOTT *v.* UNITED STATES, *ante*, p. 843;

No. 79–6610. PRIESTER *v.* BANKER'S TRUST OF SOUTH CAROLINA, ADMINISTRATOR, ET AL., *ante*, p. 892;

No. 79–6619. ALDRIDGE *v.* FLORIDA, *ante*, p. 891; and

No. 79–6650. SKIDMORE *v.* CONSOLIDATED RAIL CORP. ET AL., *ante*, p. 854. Petitions for rehearing denied.

No. 79–6664. ALFORD *v.* CENTRAL INTELLIGENCE AGENCY, *ante*, p. 854;

No. 79–6681. MORTON *v.* STYNCHCOMBE, SHERIFF, ET AL., *ante*, p. 855;

No. 79–6690. ROSADO ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL., *ante*, p. 856;

No. 79–6711. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL., *ante*, p. 857;

No. 79–6757. RUCKER *v.* FICKAS ET AL., *ante*, p. 860;

No. 79–6772. CLUGSTON ET AL. *v.* MICHIGAN ET AL., *ante*, p. 861;

No. 79–6818. SMITH *v.* ASSIGNMENT OFFICE OF MONTGOMERY COUNTY CIRCUIT COURT ET AL., *ante*, p. 864;

No. 79–6826. PREJEAN *v.* LOUISIANA, *ante*, p. 891;

No. 79–6831. HUNTER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, *ante*, p. 865;

No. 79–6861. MARATTY *v.* KENTUCKY, *ante*, p. 866;

No. 80–1. GREEN *v.* BARTHOLOMEW ET AL., *ante*, p. 868;

No. 80–32. HYNNING *v.* DUFIEF MORTGAGE, INC., ET AL., *ante*, p. 802;

No. 80–44. DUAL MANUFACTURING & ENGINEERING, INC., ET AL. *v.* BURRIS INDUSTRIES, INC., ET AL., *ante*, p. 870;

No. 80–163. IN RE CHESTNUTT MANAGEMENT CORP., *ante*, p. 816;

No. 80–211. JOHNSTON *v.* UNITED STATES ET AL., *ante*, p. 876;

No. 80–5050. JOHNS *v.* NANAWALE COMMUNITY ASSN. ET AL., *ante*, p. 921;

No. 80–5051. NEWBOLD *v.* UNITED STATES POSTAL SERVICE ET AL., *ante*, p. 878;

No. 80–5053. QUINONES *v.* TEXAS, *ante*, p. 893; and

No. 80–5173. CLAY, ADMINISTRATOR *v.* HALL ET AL., *ante*, p. 914. Petitions for rehearing denied.

No. 80–5220. DiSILVESTRO *v.* UNITED STATES, *ante*, p. 903. Petition for rehearing denied.

No. 5, Orig. UNITED STATES *v.* CALIFORNIA, 447 U. S. 1. Petition for rehearing denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 79–1396. INTERNATIONAL BUSINESS MACHINES CORP. *v.* GREYHOUND COMPUTER CORP., 446 U. S. 929; and

No. 79–1397. INTERNATIONAL BUSINESS MACHINES CORP. *v.* GREYHOUND COMPUTER CORP., 446 U. S. 916. Motion for leave to file petition for rehearing denied. JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 79–1722. PITSENBERGER *v.* PITSENBERGER, *ante*, p. 807. Motion of appellant for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 79–2044. NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* HUFSTEDLER, SECRETARY OF EDUCATION, ET AL., *ante*, p. 808. Petition for rehearing denied. JUSTICE BLACKMUN dissents. JUSTICE STEWART took no part in the consideration or decision of this petition.

DECEMBER 5, 1980

Dismissal Under Rule 53

No. 80–559. VANDERWATER *v.* LOPEZ. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 620 F. 2d 1229.

DECEMBER 8, 1980

Appeals Dismissed

No. 80–176. DANA CORP. ET AL. *v.* CALIFORNIA ET AL.; and

No. 80–177. CONTIGNITRON CO. *v.* CALIFORNIA ET AL. Appeals from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 103 Cal. App. 3d 424, 162 Cal. Rptr. 875.

No. 80–551. BUTCHER *v.* SUPERIOR COURT OF LOS ANGELES COUNTY (HENNEFER ET AL., REAL PARTIES IN INTEREST). Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 80–662. SULLIVAN *v.* KAISER ENGINEERS, INC., ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 62 Ohio St. 2d 304, 405 N. E. 2d 302.

No. 80–552. CALIFORNIA MANUFACTURERS ASSN. ET AL. *v.* INDUSTRIAL WELFARE COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 27 Cal. 3d 690, 613 P. 2d 579.

No. 80–591. VALAD ELECTRIC HEATING CORP. *v.* TED R. BROWN & ASSOCIATES, INC., ET AL. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 618 P. 2d 1004.

No. 80–5451. REED *v.* DEL CHEMICAL CORP. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 44 Ore. App. 79, 605 P. 2d 759.

Certiorari Granted—Reversed and Remanded. (See No. 79–2040, *ante*, p. 86.)

Miscellaneous Orders

No. A–397. LEAD INDUSTRIES ASSN., INC., ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL.; and

No. A–404. NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. The requests of applicants, Lead Industries Association, Inc., and

National Association of Recycling Industries, Inc., for a stay of the Occupational Safety and Health Administration's final standard for occupational exposure to lead, 29 CFR § 1910.1025 (1979), and of the decision of the United States Court of Appeals for the District of Columbia Circuit sustaining in part and remanding in part that standard, 208 U. S. App. D. C. 60, 647 F. 2d 1189, are granted in the following respects, pending the filing and disposition of petitions for certiorari.

It is ordered the the following portions of 29 CFR § 1910.1025 (1979) are stayed:

(1) Sections 1910.1025 (e)(1), (4), (5), (6), which provide for compliance by engineering and work practice controls.

(2) Section 1910.1025 (e)(3), which governs written compliance programs, except for paragraph (F).

(3) Section 1910.1025 (f)(2)(ii), which relates to the use of respirators in situations in which engineering and work practice controls are not sufficient. During the period of this stay, employers shall provide a powered, air-purifying respirator in lieu of the respirator specified in Table II of (f)(2)(i) when the physical characteristics of the employee are such that the respirators specified in Table II are inadequate for his or her protection. All other sections of the regulation that refer to paragraph (f) shall incorporate only those portions of (f) not stayed herein.

(4) Section 1910.1025 (i), governing hygiene facilities and practices, to the extent that it requires the construction of new facilities or substantial renovation of existing facilities.

(5) Sections 1910.1025 (j)(2) and (j)(3)(ii)(D) insofar as they require biological monitoring and medical examination for zinc protoporphyrin; and § 1910.1025 (j)(3)(iii), which requires a multiple physician review mechanism.

(6) Section 1910.1025 (m), dealing with signs.

(7) Section 1910.1025 (r), startup dates, to the extent that its obligations are inconsistent with the substantive requirements of this order.

The motion to stay the application of all other sections of the standard not specifically stayed by this order is denied.

The motion to stay the judgment and order of the Court of Appeals is granted insofar as the judgment and order require action inconsistent with the stay hereby entered. Otherwise, the motion to stay the judgment and order is denied, including the motion to stay the administrative proceedings ordered by the Court of Appeals.

JUSTICE POWELL took no part in the consideration or decision of these applications.

No. A–458. DAWSON *v.* HOLGUIN ET AL. 6th Jud. Dist. Ct., Grant County, N. M. Application for stay of proceedings, addressed to JUSTICE POWELL and referred to the Court, denied.

No. 79–1252. CALIFORNIA ET AL. *v.* SIERRA CLUB ET AL.; and

No. 79–1502. KERN COUNTY WATER AGENCY ET AL. *v.* SIERRA CLUB ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 818.] Motion of the Solicitor General for additional time for oral argument and for divided argument granted, and an additional 20 minutes allotted the federal respondents for that purpose.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion of the Solicitor General and cross-motion of Louisiana for divided argument granted. Requests for additional time for oral argument granted, and a total of one hour and forty minutes allotted for oral argument. [For earlier order herein, see, *e. g.*, *ante*, p. 812.]

No. 79–1890. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* ALASKA ET AL.; and

No. 79–1904. KENAI PENINSULA BOROUGH *v.* ALASKA ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 818.] Motion of the Solicitor General for divided argument granted.

No. 79–1944. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. [Certiorari granted, *ante*, p. 819.] Motion of Ricky Hasbrouck et al. for leave to file a brief as *amici curiae* granted.

No. 79–2006. BARRENTINE ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 819.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 79–6423. LASSITER *v.* DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY. Ct. App. N. C. [Certiorari granted, *ante*, p. 819.] Motion of North Carolina Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 79–6624. ROSALES-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 819.] Motion of the Solicitor General to permit George W. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 79–6853. WEBB *v.* WEBB. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 819.] Motion of National Center on Women and Family Law, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 820.] Motion of the Solicitor General for divided argument on behalf of respondents granted. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 80–5617. IN RE RELIFORD. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 80–581. COMMONWEALTH EDISON CO. ET AL. *v.* MONTANA ET AL. Appeal from Sup. Ct. Mont. Probable jurisdiction noted. Case set for oral argument in tandem with consolidated cases No. 80–11, *Merrion et al., dba Merrion & Bayless, et al.* v. *Jicarilla Apache Tribe et al.*, and No. 80–15, *Amoco Production Co. et al.* v. *Jicarilla Apache Tribe et al., supra.* The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: —— Mont. ——, 615 P. 2d 847.

Certiorari Granted

No. 80–264. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS CO. C. A. 2d Cir. Certiorari granted. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 17.

No. 80–590. GULF OFFSHORE CO., A DIVISION OF POOL CO. *v.* MOBIL OIL CORP. ET AL. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari granted. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 594 S. W. 2d 496.

No. 80–420. FLYNT ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari granted. Reported below: 63 Ohio St. 2d 132, 407 N. E. 2d 15.

No. 80–441. GULF OIL CO. ET AL. *v.* BERNARD ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 619 F. 2d 459.

Certiorari Denied. (See also Nos. 80–552, 80–591, and 80–5451, *supra.*)

No. 80–239. FEDERAL INSURANCE CO. *v.* SOLO CUP CO. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 1178.

No. 80–252. TEXAS A & M UNIVERSITY ET AL. *v.* GAY STUDENT SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 160.

No. 80–331. HICKS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1295.

No. 80–379. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 240, 627 F. 2d 293.

No. 80–404. UNITED STATES FIDELITY & GUARANTY CO. *v.* HENDERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 530.

No. 80–494. RIVCOM CORP. *v.* AGRICULTURAL LABOR RELATIONS BOARD ET AL. Sup. Ct. Cal. Certiorari denied.

No. 80–510. SINGH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 758.

No. 80–533. LA CORBIERE *v.* SAN DIEGO STATE UNIVERSITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 594.

No. 80–550. HONOLULU SPORTING GOODS CO., LTD., A DIVISION OF ZALE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 310.

No. 80–558. WEINGARDEN *v.* UNITED STATES;

No. 80–632. GOLDEN *v.* UNITED STATES; and

No. 80–682. TAPERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 625 F. 2d 111.

No. 80–560. SAN JOAQUIN NISEI FARMERS LEAGUE ET AL. *v.* INDUSTRIAL WELFARE COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 27 Cal. 3d 690, 613 P. 2d 579.

No. 80–562. HATAMI *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–566. CHAVIS ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 45 N. C. App. 438, 263 S. E. 2d 356.

No. 80–567. PEREA *v.* STOUT ET AL. Ct. App. N. M. Certiorari denied. Reported below: 94 N. M. 595, 613 P. 2d 1034.

No. 80–572. SAMBS *v.* CITY OF BROOKFIELD. Sup. Ct. Wis. Certiorari denied. Reported below: 97 Wis. 2d 356, 293 N. W. 2d 504.

No. 80–575. THOMPSON *v.* NATIONAL RAILROAD PASSENGER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 814.

No. 80–589. CITY OF MANASSAS PARK ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 224 Ct. Cl. 515, 633 F. 2d 181.

No. 80–621. WASHINGTON *v.* HANTON. Sup. Ct. Wash. Certiorari denied. Reported below: 94 Wash. 2d 129, 614 P. 2d 1280.

No. 80–658. FREY ET AL. *v.* PANZA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 596.

No. 80–665. SOUTHLAND NEWS, INC. *v.* CITY OF SPRINGFIELD, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–725. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80–739. AAA TRUCKING CORP. ET AL. *v.* GREEN ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–751. ESCOBEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1098.

No. 80–5008. SIMMONS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 381 So. 2d 803.

No. 80–5188. LONG *v.* MASON, HEAD OF CORRECTIONS. Ct. App. Ore. Certiorari denied. Reported below: 45 Ore. App. 335, 608 P. 2d 624.

No. 80–5224. JOHNSON *v.* HAMILTON, JUDGE. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 266 S. E. 2d 125.

No. 80–5231. PRUITT *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 274 S. C. 565, 266 S. E. 2d 779.

No. 80–5321. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 756.

No. 80–5457. QUINONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1222.

No. 80–5466. HENRIKSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5471. WHITEHEAD *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1352.

No. 80–5530. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 627.

No. 80–5538. CORLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 416 A. 2d 713.

No. 80–5540. GRINAN *v.* TRESPALACIOS. C. A. 3d Cir. Certiorari denied.

No. 80–5547. BLUE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5556. HAMLET *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–5557. ROBINSON *v.* MCCALL ET AL.; ROBINSON *v.* WOODARD ET AL.; ROBINSON *v.* NORTH CAROLINA ET AL.; ROBINSON *v.* SALMON ET AL.; and ROBINSON *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 862 (first case); 626 F. 2d 863 (second and third cases); 628 F. 2d 1350 (fourth case); 634 F. 2d 625 (fifth case).

No. 80–5562. BUCHANAN *v.* SOWDERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 213.

No. 80–5564. MOBLEY ET AL. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 386 So. 2d 329.

No. 80–5575. JENKINS *v.* WEST VIRGINA BOARD OF PROBATION AND PAROLE. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5587. SMITH *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5598. GOOLSBY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 275 S. C. 110, 268 S. E. 2d 31.

No. 80–5601. DILLARD *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5609. VADER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 630 F. 2d 792.

No. 80–5620. FLEMING *v.* UNITED STATES SUPREME COURT ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5648. FENNELL *v.* UNITED STATES; and
No. 80–5656. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 494.

No. 80–5651. WILLIAMS *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5668. BATIMANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1366.

No. 80–5669. THORNHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–5670. TAYLOR *v.* UNITED STATES; and
No. 80–5680. MAULDIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–5673. DEVINCENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 632 F. 2d 145.

No. 80–5676. HAMPTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–5690. TIERNAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 777.

No. 80–5695. BANCROFT ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 632.

No. 80–5701. MONTGOMERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–416. MERCK & CO., INC. *v.* STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–434. SMITHKLINE CORP. *v.* STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari before judgment denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–458. CITY OF SOUTH LAKE TAHOE ET AL. *v.* CALIFORNIA TAHOE REGIONAL PLANNING AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 2d 231.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court held that members of a local school board had standing to challenge in federal court the constitutionality of a state statute that required them to lend books to parochial school students. Addressing the constitutional requirement that the parties have a "personal stake in the outcome" of the litigation, the Court found such a "stake" in the dilemma that the appellants confronted: a choice between violating their oaths of office to support the United States Constitution or refusing to comply with the statutory requirements, a step which was "likely to bring their expulsion from office and also a reduction in state funds for their school district." *Id.*, at 241, n. 5. The Court of Appeals in the present case stated that

> "[w]ere *Allen* the last word from the Supreme Court on standing, we could simply adopt [its] rationale . . . and determine that the councilmembers in the case before us have standing on the basis that they believe that enforcing the . . . ordinances would violate their oaths of office." 625 F. 2d 231, 236 (1980).

The court declined to follow *Allen*, however, holding instead that our subsequent cases have effectively overruled *Allen*. I do not believe that we have *sub silentio* overruled *Allen*. The Courts of Appeals, however, are in conflict over its continuing validity. Compare *Regents of the Univ. of Minn.* v. *NCAA*, 560 F. 2d 352, 363–364 (CA8 1977), and *Aguayo* v. *Richardson*, 473 F. 2d 1090, 1100 (CA2 1973), with *Finch* v. *Mississippi State Medical Assn., Inc.*, 585 F. 2d 765 (CA5 1978). If the *Allen* doctrine is to be reconsidered, it should be done by this Court, and not by the various Courts of Appeals. I therefore dissent from the denial of certiorari.

The California Tahoe Regional Planning Agency (CTRPA) is a political subdivision of the State of California, exercising responsibility for the development and enforcement of plans for land and resource development in the Lake Tahoe region of California. Cal. Gov't Code Ann. § 67040 *et seq.* (West Supp. 1980). The city of South Lake Tahoe lies within the geographic area regulated by the CTRPA. Petitioners, the city, its Mayor and four council members, are required by law to enforce CTRPA regulations, Cal. Gov't Code Ann. §§ 67072, 67102 (West Supp. 1980). A willful failure of a state official to perform his duty is a misdemeanor. Cal. Gov't Code Ann. § 1222 (West 1980), which may result in removal from office. Cal. Penal Code. Ann. § 661 (West 1970).

In August 1975, the CTRPA enacted the plan of land-use and transportation regulations that is the subject of this lawsuit. Petitioners, believing that enforcement of these regulations would be unconstitutional on a number of grounds,[1] brought suit in Federal District Court seeking injunctive and declaratory relief. The District Court dismissed the action, believing that federal-court abstention was appropriate. The Court of Appeals affirmed, holding that petitioners did not have standing to invoke the jurisdiction of the federal courts.

The Court of Appeals relied primarily on *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208 (1974), and *United States* v. *Richardson*, 418 U. S. 166 (1974), to support its conclusion that petitioners could no longer claim standing under

[1] Specifically, petitioners alleged that enforcement of the challenged regulations would (1) take property for public use without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments; (2) deprive persons subject to the regulations of equal protection of the laws, in violation of the Fifth and Fourteenth Amendments; (3) unreasonably infringe the right to travel, in violation of the Fourteenth Amendment; and (4) conflict with and frustrate the land-use ordinance and transportation plan of the Tahoe Regional Planning Compact, which was approved by Congress, in violation of the Supremacy Clause of Art. VI.

Allen. Those cases held that Art. III requires that a party assert more than "the generalized interest of all citizens in constitutional governance" to invoke the jurisdiction of the federal courts. I do not doubt the validity of this principle. See *Los Angeles* v. *Lyons, ante*, p. 934 (WHITE, J., dissenting from denial of certiorari). *Allen*, however, was not, nor could it have been, an exception to this constitutional requirement. Therefore, I do not believe that *Schlesinger* and *Richardson* have had the effect the lower court ascribed to them.

Appellants in *Allen* did not simply express abstract disapproval of a government policy; rather, they were required by their position to act to implement that policy and a failure to act would have threatened immediate injury. At the same time, however, appellants were bound by their oaths to act in a contrary manner. It was this dilemma that created a personal stake in the controversy and that distinguishes their situation from that of the parties in either *Schlesinger* or *Richardson*.[2] Nor is it sufficient to argue that this dilemma could be avoided simply by resignation, as suggested by the concurring opinion below: this alternative only further distinguishes the plaintiffs from other citizens and demonstrates their concrete interests in the controversy. Petitioners in this case face exactly the same kind of dilemma. Therefore, as the Court of Appeals noted, *Allen* controls this situation if it is still good law.

The Court of Appeals also held that the city had no stand-

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[2] *Allen* also suggested, as an alternative ground, that appellants had standing because a refusal to enforce the statute could bring about a reduction in the state funds for their school districts. On this theory, appellants had standing to represent the interests of their institution and the larger group of people that would be adversely affected by the reduction in funding. Similarly, petitioners in this case alleged that the city would suffer a loss of funds, through a decrease in property values and thereby tax revenues, and sought standing as the representatives of this larger group of residents that would be adversely affected by the statute.

ing because a political subdivision of a State may not raise constitutional objections to the validity of a state statute, citing, *Williams* v. *Mayor of Baltimore*, 289 U. S. 36, 40 (1933); *Newark* v. *New Jersey*, 262 U. S. 192, 196 (1923); *Trenton* v. *New Jersey*, 262 U. S. 182, 188 (1923); *City of New York* v. *Richardson*, 473 F. 2d 923, 929 (CA2 1973); *Aguayo* v. *Richardson*, *supra*, at 1100–1101. Such a *per se* rule is inconsistent with *Allen*, in which one of the appellants was a local board of education. Furthermore, there is a conflict in the Circuits over the validity of such a rule. Cf. *Rogers* v. *Brockette*, 588 F. 2d 1057, 1067–1071 (CA5 1979), and *City of New York* v. *Richardson*, *supra*.

Because the jurisdictional questions raised by this case are important and have received conflicting answers in the Courts of Appeals and because the case raises a question of the continuing validity of our own precedent, I would grant certiorari and set the case for plenary consideration.

JUSTICE BRENNAN would also grant the petition for writ of certiorari.

No. 80–574. ATTORNEY GENERAL OF NEW JERSEY *v.* BISACCIA. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 623 F. 2d 307.

No. 80–482. LEAD INDUSTRIES ASSN., INC. *v.* ENVIRONMENTAL PROTECTION AGENCY; and

No. 80–483. ST. JOE MINERALS CORP. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 208 U. S. App. D. C. 1 and 55, 647 F. 2d 1130 and 1184.

No. 80–609. JOHNSON *v.* NORDSTROM-LARPENTEUR AGENCY, INC. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 623 F. 2d 1279.

No. 80–515. YORK *v.* FEDERAL HOME LOAN BANK BOARD ET AL. C. A. 4th Cir. Motions of National Association of State Savings and Loan Supervisors and North Carolina Savings and Loan League for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 624 F. 2d 495.

No. 80–5058. DAVID LEVELL W. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

JUSTICE MARSHALL, dissenting.

Petitioner, a 13-year-old minor, was taken from his home to a police station for questioning by police officers who had neither an arrest warrant nor probable cause for his arrest. The court below held that there was no violation of petitioner's constitutional rights because the officers acted on instructions from his mother. Because I believe the case presents an important question concerning a parent's authority to waive her minor child's right under the Fourth and Fourteenth Amendments to be free from "unreasonable seizures," I dissent from denial of the petition for a writ of certiorari.

I

On March 8, 1979, an investigator with the Los Angeles Police Department told two of his subordinates that he had been in contact with a mother about one of her children who allegedly had been involved in a burglary. He told the officers that the mother had agreed to bring the minor to the police station the previous day but had failed to do so, and he instructed the officers to go to the woman's house and find out when she would bring her son to the station.

At the house, the officers were invited into a bedroom where they saw petitioner's mother lying in bed. The officers informed her of the reason for their visit and asked why she had not brought her son to the police station the previous day as she had promised. Petitioner's mother explained that her car had broken down, and when the officers asked her if

she could bring the boy in that day, she told them that her car was still not working. The officers next inquired where her son was. The mother pointed to petitioner, who was lying in another bed in the same room, and told him to wake up. The officers then asked her when she would be able to bring her son in and she replied: "Well, you officers are here. You can take him down." She told the officers that she had been having trouble with her son and wanted to know if he had been involved in a burglary so she could notify his probation officer. She then told petitioner to get out of bed and get dressed because the officers were waiting for him. Petitioner dressed and left the house with the officers, who placed him in handcuffs before driving him to the police station. At the station, petitioner was given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). He indicated that he understood them, waived his rights, and confessed to the burglary.[1]

A petition was filed against petitioner in juvenile court charging him with burglary in violation of § 459 of the Cal. Penal Code Ann. (West Supp. 1980). Petitioner filed a motion to suppress the confession he made at the police station as the fruit of an illegal arrest. At the combined suppression and adjudication hearing, the State conceded that the police officers had neither an arrest warrant nor probable cause to arrest petitioner at the time he was taken to the station for questioning. Nonetheless, the court denied the suppression motion and relied on the confession in sustaining the charge against petitioner. At the dispositional hearing, the court ordered that petitioner be removed from the custody of his mother. Physical confinement was set at a maximum period of two years.

[1] This statement of facts is from the opinion of the court below which was originally published at 103 Cal. App. 3d 469 (1980) (advance sheets) and included as petitioner's appendix to his petition for certiorari before this Court. On July 18, 1980, the California Supreme Court ordered that the opinion not be published in the official California Appellate Reports.

On appeal, a divided California Court of Appeal affirmed the judgment of the juvenile court. The majority found no proof that petitioner had agreed to accompany the officers to the station. But relying on California cases that had "recognized and acknowledged the supervisorial authority and control of parents over their children," [2] the majority held that petitioner's constitutional rights were not violated because both petitioner and the police officers complied with his mother's request that he be taken to the station for questioning.[3] The Supreme Court of California denied a petition for a hearing without opinion.[4]

II

If petitioner had been five years older when the arrest occurred, there would be no question that the judgment below must be reversed. In *Dunaway* v. *New York*, 442 U. S. 200, 216 (1979), we held that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests." Here, the court below specifically found that petitioner did not personally consent to accompany the officers to the station.[5] The officers did not ask petitioner if he was willing to accompany them to the station. And the officers did not believe that petitioner was accompanying them voluntarily, for they placed him in handcuffs to prevent him escaping en route to the station. Moreover, as respondent concedes, the officers had neither a warrant nor probable cause to arrest petitioner

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[2] App. to Pet. for Cert. 6.

[3] On this issue, the dissenting judge argued that the police officers violated petitioner's constitutional right by detaining him for custodial interrogation at a time when they had neither a warrant nor probable cause for his arrest. *Id.*, at 15–20 (Jefferson, J., dissenting).

[4] Two judges of that court indicated that they would have granted the petition for a hearing.

[5] *Id.*, at 5.

when they took him to the station for questioning. If he were an adult, petitioner's subsequent confession would have to be suppressed as the fruit of an illegal arrest. *Wong Sun* v. *United States*, 371 U. S. 471 (1963).[6]

The court below reached a different result solely because petitioner is a minor. Thus, the case squarely presents the question whether a constitutional violation occurred when petitioner, a minor, was taken from his home to a police station for questioning by police officers who, although they had his mother's consent to their action, had neither an arrest warrant nor probable cause for petitioner's arrest. I believe that the Court should consider this issue.

The Court has never previously considered the scope of Fourth Amendment protections when asserted by a minor.[7] Indeed, we have never attempted to define the "totality of the relationship of the juvenile and the state." *In re Gault*, 387 U. S. 1, 13 (1967). Nonetheless our cases have established that minors "are 'persons' under our Constitution . . . possessed of fundamental rights which the state must respect . . . ." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 511 (1969). As we explained in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 74 (1976): "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of maturity. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[8]

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[6] There is no suggestion that the causal connection between petitioner's detention and his confession was broken in a manner which might purge the taint of the arrest.

[7] The Fourth Amendment is applicable to the States through the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

[8] We have held that minors are entitled to constitutional protection for freedom of speech, *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), equal protection against racial discrimination, *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and due process in civil proceedings, *Goss* v. *Lopez*, 419 U. S. 565 (1975).

Moreover, our cases have exhibited particular sensitivity to minors' claims to constitutional protection against deprivations of liberty by the State. Because loss of liberty is no less a deprivation for a child than for an adult, *In re Gault*, 387 U. S., at 27, we have held that a minor's right with respect to many of these claims is virtually coextensive with an adult's. Thus, we have extended the Fourteenth Amendment's guarantee against deprivation of liberty without due process of law to minors involved in juvenile proceedings. We have held that a minor facing juvenile charges is entitled to notice, counsel, and confrontation of witnesses. *Id.*, at 33, 36–37, 57. "'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.'" *Id.*, at 13, quoting with approval *Haley* v. *Ohio*, 332 U. S. 596, 601 (1948) (Douglas, J., plurality opinion). Similarly, our cases have accorded minors the right against self-incrimination, *In re Gault, supra*, protection against coerced confessions, *Gallegos* v. *Colorado*, 370 U. S. 49 (1962); *Haley* v. *Ohio, supra*, guarantees against double jeopardy, *Breed* v. *Jones*, 421 U. S. 519 (1975), and the presumption of innocence implemented by the government's burden to prove guilt beyond a reasonable doubt, *In re Winship*, 397 U. S. 358 (1970).

I believe that if the Court examined this issue, we would be hard-pressed to find reasons to distinguish these rights, which clearly apply to minors, from the Fourth Amendment right invoked by petitioner.[9] No less than due process pro-

[9] Many state and lower federal courts have extended Fourth Amendment guarantees to minors involved in juvenile proceedings. See, *e. g.*, *Brown* v. *Fauntleroy*, 143 U. S. App. D. C. 116, 442 F. 2d 838 (1971); *Cooley* v. *Stone*, 134 U. S. App. D. C. 317, 414 F. 2d 1213 (1969); *In re Scott K.*, 24 Cal. 3d 395, 595 P. 2d 105 (1979); *In re Harvey*, 222 Pa. Super. 222, 229, 295 A. 2d 93, 96–97 (1972); *In re Morris*, 29 Ohio Misc. 71, 278 N. E. 2d 701 (Columbiana Cty. Common Pleas Ct. 1971); *Ciulla* v. *State*, 434 S. W. 2d 948, 950 (Tex. Civ. App. 1968); *State* v. *Lowry*, 95 N. J. Super. 307, 313–317, 230 A. 2d 907, 910–912 (1967); *In re Williams*,

tections, the guarantee against unreasonable governmental searches and seizures "defines the rights of the individual and delimits the powers which the state may exercise." *In re Gault, supra,* at 20 (footnote omitted). As the Court has stated, the Fourth Amendment protects "[t]he security of one's privacy against arbitrary intrusion by the police . . . ." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949). Neither the court below nor respondent goes so far as to suggest that minors enjoy no protection of this personal privacy under the Fourth Amendment. Instead, respondent argues that the court below correctly held that petitioner's mother had lawful authority to instruct the police officers to take her son to the station for questioning. Respondent contends that inasmuch as petitioner's mother could have brought him to the station herself, she merely authorized the officers to do what she could have done herself.

Essential to this claim is the assumption that a parent's right to guide her child's upbringing [10] includes the authority to waive a constitutional right that the child may have.[11]

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49 Misc. 2d 154, 169–170, 267 N. Y. S. 2d 91, 109–110 (Ulster Cty. Family Ct. 1966); *Urbasek* v. *People,* 76 Ill. App. 2d 375, 222 N. E. 2d 233 (1966).

[10] See *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535 (1925).

[11] The Fourth Amendment's warrant and probable-cause requirements impose limits on the actions of the police. Respondent concedes that the police had neither a warrant nor probable cause for petitioner's detention. His mother's consent could not and did not supply the requisite probable cause or warrant. Even though petitioner's mother could have taken him to the station herself, it does not follow from this that she had the authority to waive petitioner's Fourth Amendment right and permit the police to detain him without complying with constitutional requirements.

The Supreme Court of California rejected a similar claim by the State in another case that also involved a minor's Fourth Amendment right. *In re Scott K., supra.* In that case a police officer obtained permission from a parent to search a box that belonged to his minor son. The court rejected the State's suggestion that because the father could have searched the box himself, he had the authority to permit the police to search it.

I find this assumption extremely disturbing for I see no way to cabin its implications. If a parent may, without even consulting the child, waive his constitutional rights, then the police may constitutionally coerce confessions from minors so long as the officers have the parents' consent to their action. Even more troubling, there is nothing in respondent's reasoning to preclude a juvenile court from finding a minor guilty upon proof less than beyond a reasonable doubt, as long as the parent waives that critical due process requirement. The view of parental authority advanced by respondent and adopted by the court below suggests no reason to bar these actions.

But even assuming that the view of parental authority espoused by the court below is correct, there is a major inconsistency in the court's reasoning. The court's view of parental authority rests on the supposition that petitioner was too immature to make the decision about whether to go to the station with the police officers for himself. But if that is the case, I find it hard to discern the logic of the same court's conclusion that petitioner was capable of making a knowing and intelligent waiver of his *Miranda* rights, whose application to a minor are not in doubt. Surely, if a minor in his home lacks the capacity to decide whether to accompany police officers to the station for questioning, there must be some question about the same minor's capacity to make a knowing and intelligent waiver of his rights at the police station. A coherent view, fully adopting the court's theory of a minor's incapacity, would result in the exclusion of petitioner's confession because he would be deemed incapable of waiving his *Miranda* rights. And his conviction would be reversed because it was based on the confession.[12]

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[12] Alternatively, if petitioner is presumed capable of making a knowing and intelligent decision, as the court below assumed in connection with his waiver of his *Miranda* rights, then petitioner could object to being taken, handcuffed, to the police station. And he would here be permitted to

Because I believe that the case raises important questions that were not adequately addressed by the court below, I would grant the petition for a writ of certiorari and set the case for plenary consideration.

JUSTICE BRENNAN and JUSTICE WHITE, agreeing for the most part with JUSTICE MARSHALL's dissenting opinion, would also grant certiorari.

No. 80–5123. MCKENZIE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 608 P. 2d 428.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

On two prior occasions, this Court has vacated decisions of the Supreme Court of Montana in this death penalty case and remanded the case for further consideration. *McKenzie* v. *Montana*, 443 U. S. 903 (1979); *McKenzie* v. *Montana*, 433 U. S. 905 (1977). In both instances, we directed the Supreme Court of Montana to reconsider the case in light of intervening decisions of this Court establishing that due process prohibits a State from placing on a defendant the burden to disprove an element of the offense charged. *McKenzie* v. *Montana*, 443 U. S. 903 (1979) (directing reconsideration in light of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979)); *McKenzie* v. *Montana*, 433 U. S. 905 (1977) (directing reconsideration in light of *Patterson* v. *New York*, 432 U. S. 197 (1977)). On each remand, the state court reaffirmed the conviction and reinstated the death penalty. —— Mont. ——,

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claim violation of the Fourth Amendment's probable-cause and warrant requirements by the police. This view is perhaps more consistent with decisions by this Court that have recognized the rights of minors faced with decisions that critically affect their own lives. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976) (upholding pregnant minor's right to make an abortion decision without parental consent).

608 P. 2d 428 (1980); 177 Mont. 280, 581 P. 2d 1205 (1978). In its most recent decision in this case, the State Supreme Court conceded that the jury instructions unconstitutionally shifted to petitioner the burden to disprove that he had the criminal intent necessary to support conviction. —— Mont., at ——, 608 P. 2d, at 457–458. The court nonetheless avoided granting petitioner a new trial by deeming this constitutional violation "harmless error." *Id.*, at ——, 608 P. 2d, at 458–459. A state court's analysis of harmless error in a typical case may not present a question worthy of full review by this Court, yet, where, as here, the death penalty is the result, close scrutiny is required. Because I find the court's analysis of harmless error lacking of evenhanded treatment, I dissent from this Court's denial of certiorari.

Petitioner was charged with two counts of deliberate homicide, two counts of aggravated kidnaping, one count of sexual intercourse without consent, and two counts of aggravated assault, all arising from the death of one woman. A major element in petitioner's defense was that he was incapable of "knowingly" or "purposely" committing the homicide. Petitioner and the prosecutor produced conflicting psychiatric and psychological testimony at trial concerning petitioner's ability to understand the criminal nature of his conduct and to conform his conduct to the requirements of law. Although petitioner's capacity to form the required criminal intent was thus put directly in issue, over petitioner's specific objection, the judge repeatedly directed the jury that "the law also presumes that a person intends the ordinary consequences of his voluntary act" and that "an unlawful act was done with an unlawful intent." [1] The trial court essentially instructed the

[1] Instruction 31 gave general directions on methods of proof about mental state. It stated that "the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act," but Instruction 32 noted that a "particular purpose" may be inferred but not assumed. App. to Pet. for Cert. 20g–21g. Instruction 33

jury that it could presume the necessary criminal intent if it found petitioner had committed the acts charged. Petitioner was convicted of deliberate homicide and aggravated kidnaping, and sentenced to death.

In *Sandstrom* v. *Montana*, *supra*, we explicitly held that instructions of the kind challenged by petitioner violate due process because they shift to the defendant the burden to persuade the jury that he lacked the requisite criminal intent. On remand of the instant case in light of *Sandstrom*, the Montana court agreed that the challenged instructions unconstitutionally shifted the burden of proving the intent element of the crime from the State to the defendant. — Mont., at —, 608 P. 2d, at 457. The court, however, reasoned that not all such constitutional errors are prejudicial [2]

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concerned the method of proof applicable to the offense of deliberate homicide. That instruction directed that if the jury found that petitioner committed an illegal act on the victim, "the law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose." *Id.*, at 22g. Instruction 35 described the method of proof applicable to kidnaping. It provided that because no particular purpose was required as an element of the offense, the requisite mental state could be established presumptively. Thus, if the jury found that petitioner restrained the victim "either by secreting her in a place of isolation, or by using physical force, or by threatening to use physical force to hold her, the law presumes that he acted therein with unlawful intent, purpose or knowledge, and expressly directs you to so reason." *Id.*, at 26g–27g. Instruction 37 provided that proof of the mental state requisite for sexual intercourse without consent "can be made by presumption." *Id.*, at 28g. Similarly, Instruction 38 specified that the mental state necessary for aggravated assault could be proved by the presumption that "'[a]n unlawful act was done with an unlawful intent, and the legal presumption that a person is presumed to intend the ordinary consequences of his voluntary act' can be used to prove the mental state of knowingly." *Id.*, at 30g.

[2] This Court has not decided whether it can ever be harmless to instruct a jury that it may presume criminal intent from the fact of the criminal act. See *Sandstrom* v. *Montana*, 442 U. S. 510, 526–527 (1979) (remanding on that issue).

and concluded that this Court has never mandated which of three possible standards for evaluating the harmlessness of a constitutional error [3] must be used. The court then selected the standard that permits a court to sustain the conviction despite the constitutional error where there is "overwhelming evidence" of guilt. *Id.*, at —, 608 P. 2d, at 458. Finally, the court found such overwhelming evidence was present in this case.

But what evidence did the court find sufficient to overcome the constitutional error of directing the jury to presume the presence of the requisite criminal intent from the nature of the acts committed? The Montana court itself relied solely on "the vicious manner in which the crimes were committed" in concluding that petitioner "purposely and knowingly intended" to commit the crimes. *Id.*, at —, 608 P. 2d, at 459. I cannot help but be shocked that in taking this approach, the Montana court simply applied the forbidden presumption. In so doing, the court neglected to perform its task on review: it failed to examine whether the disapproved instructions could have infected the jury verdict. Instead, the court served as another factfinder, again impermissibly placing the burden on petitioner to disprove that the nature of his acts established the requisite criminal intent. It surely cannot be that a verdict following an unconstitutional instruction permitting the jury to presume criminal intent can be im-

[3] The court reasoned:

"At least three definable approaches appear in the United States Supreme Court cases: (1) Focusing on the erroneously admitted evidence or other constitutional error to determine whether it might have contributed to the conviction[,] e. g., *Fahy* v. *Connecticut* (1963), 375 U. S. 85 . . . ; (2) excluding the constitutional infirmity where overwhelming evidence supports the conviction [,] e. g., *Milton* v. *Wainwright* (1972), 407 U. S. 371 . . . ; (3) determining whether the tainted evidence is merely cumulative or duplicates properly admitted evidence[,] e. g., *Harrington* v. *California* (1969), 395 U. S. 250 . . . ." — Mont., at —, 608 P. 2d, at 458.

munized from reversal because the reviewing court also impermissibly presumes criminal intent.

This result was perhaps inevitable once the state court selected the "overwhelming evidence" of guilt standard to analyze whether the constitutional error was harmless. For whatever value that standard may have in reviewing a verdict following introduction of evidence obtained in violation of constitutional guarantees, see, *e. g., Milton* v. *Wainwright,* 407 U. S. 371 (1972), use of the standard actually precludes effective review of the prejudicial impact of unconstitutional jury instructions.[4] Where isolated, tainted evidence is at issue, the reviewing court may exclude that evidence from its assessment of whether the remaining evidence supports the conviction. But where the constitutional error occurred in the jury instructions, no isolated portion of the record can be eliminated from the judicial assessment. Nor can the effect of the instructions be evaluated by examining the evidence alone, and ignoring the unconstitutional instructions. For the precise issue in such cases is the manner in which the jury could have assessed the evidence as a whole, not the importance of any particular piece of evidence to sustain the verdict. In selecting the "overwhelming evidence" standard on the theory that "an appellate court should view the case as a whole in assessing harmless or prejudicial error," — Mont., at —, 608 P. 2d, at 458, the state court neglected to review the possible effect of the unconstitutional instructions on the jury's verdict.

The possibility that a constitutional error in jury instructions was harmless must be evaluated on the premise that the jury acted lawfully and reasonably followed the erroneous

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[4] The Montana court acknowledged "criticism of this standard by text-writers and legal commentators." *Id.,* at —, 608 P. 2d, at 458. See, *e. g.,* Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 32–36 (1976).

instruction.[5] Then the court must ask whether the defective instruction may have contributed to the jury verdict.[6] And, before finding the error harmless, the reviewing court must be convinced beyond a reasonable doubt that the error did not so contribute. *Chapman* v. *California*, 386 U. S. 18 (1967). Indeed, on remand in *State* v. *Sandstrom*, — Mont. —, —, 603 P. 2d 244, 245 (1979), the Supreme Court of Montana followed just this analysis. We had remanded *Sandstrom* for consideration of questions such as whether the use of the disapproved instruction was harmless error in that case, and whether such error could ever be harmless. *Sandstrom* v. *Montana*, 442 U. S., at 526–527. In response, the State Supreme Court correctly applied *Chapman* in reasoning that it could find harmless error only upon concluding:

> "[T]he offensive instruction could not reasonably have contributed to the jury verdict. In considering the instruction, and the fact that intent was the main issue in

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[5] See generally R. Traynor, The Riddle of Harmless Error 73–74 (1970).

[6] Before this Court, Montana argues that even if petitioner's conviction for deliberate homicide resulted from the unconstitutional presumption of intent, his conviction for aggravated kidnaping is untainted by the error. Montana claims that because this is the case, the death penalty can stand, as only one sentence was imposed, despite petitioner's conviction on both the homicide and kidnaping counts. This argument, which was never adopted by the state court, is fatally flawed because instructions on the kidnaping charge also included the disapproved presumption of criminal intent. As Montana itself acknowledges, "the jury was then informed that they could employ the *Sandstrom* presumption to find that [kidnaping] was done 'purposely' or 'knowingly.'" Brief in Opposition 7. Montana argues that any error from this instruction was cured by the additional instructions on aggravated kidnaping. These instructions directed that after finding that petitioner committed the kidnaping, the jury could infer, but not presume, he also had particular criminal purposes to inflict bodily injury, to terrorize, or to facilitate the commission of other crimes. These additional requirements could not, however, eliminate the role of the forbidden instruction in the initial finding of a kidnaping.

> the District Court trial, we cannot make that assertion. The erroneous instruction goes to a vital element of the proof of the crime, namely the intent of the defendant Sandstrom in committing the homicide. If the jury followed the instruction, it could have presumed the intent without proof beyond a reasonable doubt." — Mont., at —, 603 P. 2d, at 245.

Therefore, the court ordered a new trial for Sandstrom. The Montana court subsequently applied the same reasoning in *State* v. *Hamilton*, — Mont. —, —, 605 P. 2d 1121, 1132 (1980) (appellate court must determine impact of instruction upon a reasonable jury).

It appears that only in petitioner's case is the Montana court unwilling to apply this analysis.[7] This seems to be yet another case in which a court sanctions "egregious violations of the constitutional rights of criminal defendants by blandly reciting the formula 'harmless error.'" *Briggs* v. *Connecticut*, 447 U. S. 912, 915 (1980) (MARSHALL, J., joined by BRENNAN, J., dissenting). However unpleasant the facts of this or other cases may be, the courts are obligated to protect the constitutional rights of the defendant. Due to concern that petitioner's rights have not been preserved, this Court has already remanded this case twice. I can understand the Court's reluctance to entertain this case yet again, for we presume that lower courts adhere to the purposes of remands from this Court. Yet the Montana court has failed to fulfill its obligation to carry out the mandate of our decisions.[8] There-

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[7] Petitioner is also the only person on whom Montana imposed the death sentence under a statute enacted in 1973 before it was amended to provide different procedures for deliberate homicide and aggravated kidnaping, the offenses relevant here. See Mont. Rev. Codes Ann. § 94–5–304 (Supp. 1974), Mont. Code Ann. §§ 45–2–101 (52), 46–18–101, 46–18–111 to 46–18–112 (1979).

[8] For this reason, this case seems a particularly apt one for seeking federal habeas corpus relief. The dissenting judge in the Montana court

fore, I would grant certiorari and set the case for plenary consideration.

I also adhere to my view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Furman* v. *Georgia*, 408 U. S. 238, 314–371 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting); *Lockett* v. *Ohio*, 438 U. S. 586, 619–621 (1978) (MARSHALL, J., concurring in judgment), and on that basis alone I would grant certiorari and vacate the death sentence in this case.

No. 80–5488. SWINDLER *v.* ARKANSAS. Sup. Ct. Ark.; and

No. 80–5602. DAVIS *v.* GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: No. 80–5488, 267 Ark. 418, 592 S. W. 2d 91; No. 80–5602, 246 Ga. 200, 269 S. E. 2d 461.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–91. DICK *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., *ante*, p. 872;

No. 80–194. RAMIREZ *v.* UNITED STATES, *ante*, p. 900;

No. 80–217. HOWELL *v.* THOMAS, SHERIFF, *ante*, p. 901;

No. 80–285. CHVOSTA *v.* PIERRE ET AL., *ante*, p. 921; and

No. 80–5268. ANTONE *v.* FLORIDA, *ante*, p. 913. Petitions for rehearing denied.

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found the majority's decision unsupportable. — Mont., at —, —, —, 608 P. 2d, at 459, 462, 465 (Shea, J., dissenting).

DECEMBER 15, 1980

Appeal Dismissed

No. 80–636. MACKINNEY ET AL. *v.* GELFGREN ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 624 F. 2d 191.

Miscellaneous Orders

No. A–490. KLUTZNICK, SECRETARY OF COMMERCE, ET AL. *v.* SHAPIRO, ESSEX COUNTY EXECUTIVE. D. C. N. J. The order entered December 4, 1980, by JUSTICE BRENNAN is continued pending the timely filing and final disposition of a petition for writ of certiorari. JUSTICE STEWART and JUSTICE STEVENS dissent.

No. A–504. CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE *v.* CITY AND COUNTY OF DENVER. Application to vacate the order of the United States Court of Appeals for the Tenth Circuit, entered December 3, 1980, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS dissent.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motions of Columbia Gas Transmission Corp. et al. for leave to file Exceptions to the Report of the Special Master and for leave to reply to the Exceptions of Louisiana are granted. Exceptions to the Report of the Special Master are set for oral argument. [For earlier order herein, see, *e. g.*, *ante*, p. 1031.]

No. 79–700. WALTER FLEISHER CO., INC. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 446 U. S. 917.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 79–1429. AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL. v. MARSHALL, SECRETARY OF LABOR, ET AL.; and

No. 79–1583. NATIONAL COTTON COUNCIL OF AMERICA *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 817.] Joint motion of the Solicitor General and union respondents for additional time for oral argument denied. Motion of the Solicitor General and union respondents for divided argument granted.

No. 79–1711. MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1754. JOINT MEETING OF ESSEX AND UNION COUNTIES *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1760. CITY OF NEW YORK ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.; and

No. 80–12. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 917.] Motion of the Solicitor General for divided argument granted.

No. 79–1794. MICHIGAN *v.* SUMMERS. Sup. Ct. Mich. [Certiorari granted, *ante*, p. 898.] Motion of John B. Holmes, Jr., et al. for leave to file a brief as *amici curiae* granted.

No. 79–1977. RODRIGUEZ *v.* COMPASS SHIPPING CO., LTD., ET AL.; PEREZ *v.* ARYA NATIONAL SHIPPING LINE, LTD.; and BARULEC *v.* OVE SKOU, R. A. C. A. 2d Cir. [Certiorari granted, *ante*, p. 818.] Motion of respondent Ove Skou, R. A., for divided argument granted.

No. 80–5. MCCARTY *v.* MCCARTY. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction postponed, *ante*, p. 917.] Motion of Non-Commissioned Officers Association of the United States et al. for leave to file a brief as *amici curiae* granted.

No. 79–6423. LASSITER *v.* DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY. Ct. App. N. C. [Certiorari granted, *ante*, p. 819.] Motion of National Legal Aid and Defender Association for leave to file a brief as *amicus curiae* granted. Motion of Gregory C. Malhoit, Esquire, to permit Leowen Evans, Esquire, to present oral argument *pro hac vice* granted. Motion of the Attorney General of North Carolina for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 80–169. UNITED PARCEL SERVICE, INC. *v.* MITCHELL ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 898.] Motions of American Federation of Labor and Congress of Industrial Organizations and International Brotherhood of Teamsters for leave to file briefs as *amici curiae* granted.

No. 80–332. RHODES, GOVERNOR OF OHIO, ET AL. *v.* CHAPMAN ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 951.] Motion of petitioners to be excused from supplementing the joint appendix granted.

No. 80–5713. IN RE CLIFTON. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 80–396. CITY OF NEWPORT ET AL. *v.* FACT CONCERTS, INC., ET AL. C. A. 1st Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 626 F. 2d 1060.

Certiorari Denied. (See also No. 80–636, *supra.*)

No. 79–1679. WASTE MANAGEMENT OF WISCONSIN, INC. *v.* FOKAKIS. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 138.

No. 79–6799. MORRIS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 415, 265 S. E. 2d 337.

No. 80–295. NATIONAL ASSOCIATION OF MINORITY CONTRACTORS ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1381.

No. 80–330. UNITED BEEF PACKERS, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–347. DE JONG PACKING CO. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1329.

No. 80–406. PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA *v.* UNITED STATES ET AL.; and

No. 80–614. MARTIN ET AL. *v.* PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 812.

No. 80–439. MELLI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 757, 429 N. Y. S. 2d 338.

No. 80–454. PARFITT ET AL. *v.* COLUMBUS CORRECTIONAL FACILITY ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 2d 434, 406 N. E. 2d 528.

No. 80–465. PAPAGO TRIBAL UTILITY AUTHORITY *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 235, 628 F. 2d 235.

No. 80–471. SUN PETROLEUM PRODUCTS CO. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 1176.

No. 80–487. HARPER ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–588. KRAMER MOTORS, INC. *v.* BRITISH LEYLAND, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1175.

No. 80–592. SHAW *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 5 Kan. App. 2d xvi, 615 P. 2d 843.

No. 80–597. MARTIN PAINTING & COATING CO. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 629 F. 2d 437.

No. 80–606. RUHLANDER ET AL. *v.* DISTRICT COURT OF HAMPSHIRE ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 381 Mass. 148, 408 N. E. 2d 830.

No. 80–612. BERGER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 46 N. C. App. 348, 275 S. E. 2d 568.

No. 80–615. BESASE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 623 F. 2d 463.

No. 80–623. WINFIELD *v.* WALGREEN CO. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 80–627. A JUVENILE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 381 Mass. 379, 409 N. E. 2d 755.

No. 80–652. JOHN T. BRADY & CO. *v.* FORM-EZE SYSTEMS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 2d 261.

No. 80–654. GOWAN *v.* ST. FRANCIS COMMUNITY HOSPITAL. Sup. Ct. S. C. Certiorari denied. Reported below: 275 S. C. 203, 268 S. E. 2d 580.

No. 80–666. BARRY *v.* AMERICAN FINANCIAL ENTERPRISES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 955.

No. 80–668. WESTERN AIR LINES, INC. *v.* INTERNATIONAL TRAVEL ARRANGERS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 623 F. 2d 1255.

No. 80–671. NAGEOTTE ET AL. *v.* COUNTY OF STAFFORD, VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cxxiii.

No. 80–705. GRANT ET AL. *v.* OWENS-CORNING FIBERGLAS CORP. ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5057. HALL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 207.

No. 80–5139. HENDERSON, AKA COLLIER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 383 So. 2d 508.

No. 80–5168. HAAR *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 94 N. M. 539, 612 P. 2d 1350.

No. 80–5226. CARTER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 397.

No. 80–5230. GAUL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 1005, 425 N. Y. S. 2d 902.

No. 80–5236. JOHNSON *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 303.

No. 80–5241. HICKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5245. PAYNE *v.* THOMPSON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 254.

No. 80–5281. RICARDO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 1124.

No. 80–5283. McCLAIN *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5297. DERRICO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 181 Conn. 151, 434 A. 2d 356.

No. 80–5310. NASH *v.* REEDEL ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5316. YOUNG *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 385 So. 2d 16.

No. 80–5351. BLAKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–5387. NEWKIRK *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1350.

No. 80–5411. GREEN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–5478. CRUTE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. lxxviii.

No. 80–5506. SAUTER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 80–5566. RAWLS *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 630 F. 2d 654.

No. 80–5567. DOERR *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 297.

No. 80–5571. COOPER *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 859.

No. 80–5572. DOUTHIT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–5576. WATKINS *v.* THOMAS, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 387.

No. 80–5580. EUGE *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1109.

No. 80–5585. PAPP *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–5588. GROFT *v.* CONNELL CHEVROLET CO., INC. C. A. 7th Cir. Certiorari denied.

No. 80–5590. WELLS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 598 S. W. 2d 770.

No. 80–5597. LYDON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 381 Mass. 356, 409 N. E. 2d 745.

No. 80–5616. FRISCH *v.* FRISCH. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 80–5625. JENKINS *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5681. BOYD *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5683. MAHLER *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1349.

No. 80–5702. MORRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 623 F. 2d 145.

No. 80–5705. JONES *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 1224.

No. 80–5712. CLIFTON *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5722. HUGHES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 619.

No. 80–5724. DUNCAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 224.

No. 80–5728. SAUNDERS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 212.

No. 80–5729. CORNWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 686.

No. 80–5730. FRANK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–418. UNITED BUSINESS COMMUNICATIONS, INC. *v.* MILGO ELECTRONIC CORP. C. A. 10th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 623 F. 2d 645.

No. 80–530. HUDSON *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 351.

No. 80–565. HEYL, AS PERSONAL REPRESENTATIVE OF ZIMMERMAN'S ESTATE AND AS GUARDIAN *v.* CARNIVAL CRUISE LINES, INC. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 625 F. 2d 1012.

No. 80–582. ZACHARY ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 621 F. 2d 155.

No. 80–691. ARKANSAS *v.* HAYNES. Sup. Ct. Ark. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BLACKMUN would grant certiorari. Reported below: 269 Ark. 506, 602 S. W. 2d 599.

No. 80–659. ADAMS *v.* PEAT, MARWICK, MITCHELL & Co. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 623 F. 2d 422.

No. 80–5179. JOHNSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 598 S. W. 2d 123.

No. 80–5561. HANCE *v.* GEORGIA. Sup. Ct. Ga.;

No. 80–5632. CLARK *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 80–5645. WITT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 80–5561, 245 Ga. 856, 268 S. E. 2d 339; No. 80–5632, 126 Ariz. 428, 616 P. 2d 888; No. 80–5645, 387 So. 2d 922.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1735. JARRETT *v.* JARRETT, *ante*, p. 927;

No. 79–6580. HOUSTON *v.* TENNESSEE, *ante*, p. 891;

No. 79–6857. CROSBY *v.* UNITED STATES DEPARTMENT OF THE AIR FORCE ET AL., *ante*, p. 866;

No. 79–6888. THERIAULT *v.* CHARLES COLSON PRISON FELLOWSHIP ET AL., *ante*, p. 952;

No. 80–45. JOHNSON *v.* J. O. L., *ante*, p. 989;

No. 80–250. CRAMER *v.* METROPOLITAN FEDERAL SAVINGS & LOAN ASSN. ET AL., *ante*, p. 876;

No. 80–5186. PATTERSON *v.* GARRINGTON, WARDEN, *ante*, p. 922; and

No. 80–5202. IN RE MAGEE, *ante*, p. 949. Petitions for rehearing denied.

No. 80–5217. BROWN *v.* JERNIGAN, WARDEN, *ante*, p. 958;

No. 80–5274. TWYMAN *v.* HESS, WARDEN, ET AL., *ante*, p. 959;

No. 80–5276. LANDI *v.* CALIFORNIA, *ante*, p. 959; and

No. 80–5401. DANKERT *v.* GEORGIA, *ante*, p. 986. Petitions for rehearing denied.

No. 79–972. WESTVACO CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL., *ante*, p. 915. Petition of Georgia-Pacific Corp. and Packaging Corporation of America for rehearing and for further relief denied. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 80–5272. BROWN *v.* KANSAS WORKMEN'S COMPENSATION FUND, *ante*, p. 914. Petition for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

DECEMBER 30, 1980

Miscellaneous Order

No. A–567. KLUTZNICK, SECRETARY OF COMMERCE, ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. The application of the Solicitor General for a stay pending appeal to the United States Court of Appeals for the Second Circuit was presented to JUSTICE MARSHALL as Circuit Justice, and by him referred to the Court. The application was directed to that portion of the judgment entered December 29, 1980, by the United States District Court for the Southern District of New York, case No. 80 Civ. 4550, that precludes the Bureau of the Census from certifying to the President the population totals for New York and the state-by-state census tabulations, on December 31, 1980, as mandated by 13 U. S. C. § 141 (b). The application is hereby granted. This order shall remain in effect pending disposition of the appeal by

the Court of Appeals. JUSTICE STEVENS took no part in the consideration or decision of this application.

JUSTICE MARSHALL, dissenting.

In this case, applicant Secretary of Commerce and others seek a stay pending appeal, of an order of the United States District Court for the Southern District of New York, enjoining the Census Bureau from certifying the official tabulation of New York State's population to the President as required by 13 U. S. C. § 141 (b). Respondents include the City of New York and its Mayor; the Governor of the State; and several voters and taxpayers in various city, congressional, and state senatorial and assembly districts who filed suit in District Court alleging that the 1980 census was conducted in a manner that will inevitably result in an undercount, largely in low-income areas populated by members of minority groups. Specifically, respondents alleged that the master address registers used by the Census Bureau were grossly inadequate and that the followup check of the master address registers by Postal Service and census workers was grossly inadequate. Respondents' ultimate contentions were that the resulting undercount not only will cause New York to lose at least one congressional seat to which it is entitled when reapportionment is made pursuant to the 1980 census, but that it will also result in the dilution of the votes of New York residents vis-à-vis those of residents of other States, and will cost New York City and the State vast sums of money distributed under federal revenue sharing and other programs with statutory formulas tied to the census.

The District Court initially entered a preliminary injunction against the Census Bureau: It found that respondents had established a clear possibility of irreparable harm to the efficacy of their votes, and that respondents were likely to succeed because they had submitted significant evidence concerning Census Bureau mismanagement and had raised serious questions as to whether some of the Bureau's policies and

procedures were carried out in an arbitrary and irrational manner. The District Court declined to stay the preliminary injunction, and on appeal, the Court of Appeals for the Second Circuit affirmed the District Court's denial of a stay. The Court of Appeals found that respondents had demonstrated a possibility of irreparable harm and had also shown sufficient prospect of success on the merits to justify a preliminary injunction, and that the District Court did not disregard traditional equitable principles in issuing the preliminary injunction.

On December 22, 1980, the District Court entered final judgment in favor of respondents. The court found that the Bureau's implementation of the census was improper in several respects and that the Bureau's mismanagement of the census had resulted in a significant undercount in New York. The District Court ordered the Bureau to adjust the actual census data regarding New York in a reasonable and scientific manner to compensate for the disproportionate undercount, and it enjoined the Bureau from certifying New York's population totals to the President on December 31, 1980, as required by statute. Applicants then brought this stay application.

Most of applicants' memorandum in support of their stay application is devoted to arguing that the respondents are unlikely to succeed on the merits of the case.* On the sparse record before this Court, I am not prepared to conclude that respondents cannot prevail on the merits. The Court of

*Applicants also rely on JUSTICE STEWART's stay of the District Court's decision in *Young* v. *Klutznick*, 497 F. Supp. 1318 (ED Mich. 1980). In that case, the District Court enjoined the Census Bureau from certifying population totals for *any* States by December 31, 1980. But in this case, unlike in *Young*, the District Court order *only* applies to *New York's* population totals. Thus, applicants cannot rely on the alleged interest of various States in using the census figures for redistricting purposes for state legislatures.

Appeals rejected applicants' claim that respondents cannot prevail on the merits and, as noted, the District Court has ruled against applicants as has at least one other District Court. For me, the crucial issue in ruling on this application is applicants' inability to show that there is a substantial likelihood that they will suffer irreparable harm if a stay is not issued. The only thing applicants point to is that the Census Bureau will be unable to comply with the December 31 deadline if the District Court's order is not stayed. But as the Court of Appeals pointed out, there is nothing sacrosanct about the December 31 deadline. If the District Court's conclusion is correct, the inability to meet the deadline is the Bureau's own fault. Moreover, the actual reapportionment of seats based on the 1980 census will not commence until some later date and there is nothing about the District Court's order that prevents this reapportionment from taking place well in advance of the 1982 congressional elections.

Applicants' failure to prove irreparable harm from denial of their stay application stands in marked contrast to the irreparable harm that will be inflicted on respondents if the Census Bureau is allowed to certify inaccurate (at least according to the District Court) results to the President. Applicants have not suggested that there is any procedure for correcting these "inaccurate" figures once they are reported to the President and he transmits them to Congress as required by statute, and these figures will presumably be the basis for the reapportionment of congressional seats and a variety of federal revenue grants. The members of minority groups and other residents of low-income areas who were not counted by the Census Bureau will therefore suffer the irreparable injury stemming from the undercount. Thus, it appears that granting the application not only fails to preserve the status quo, it may actually moot the underlying controversy. In these circumstances, I cannot agree that a stay must issue.

JANUARY 12, 1981

Appeals Dismissed

No. 80–576. LACLEDE GAS CO. *v.* PUBLIC SERVICE COMMISSION OF MISSOURI. Appeal from Ct. App. Mo., Western Dist., dismissed for want of substantial federal question. Reported below: 600 S. W. 2d 222.

No. 80–593. BISHOP *v.* BURTON. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 246 Ga. 153, 269 S. E. 2d 417.

No. 80–5554. HERRERA *v.* HERNANDEZ. Appeal from Ct. Civ. App. Tex., 13th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 595 S. W. 2d 189.

No. 80–5355. WHITTEMORE *v.* CIRCUIT COURT OF KENOSHA COUNTY. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction. JUSTICE BLACKMUN would dismiss the appeal for want of jurisdiction, treat the papers whereon the appeal was taken as a petition for writ of certiorari, and deny certiorari.

No. 80–5551. CONRAD *v.* BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 80–5725. GOODEN *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 600 S. W. 2d 336.

No. 80–5781. PRENZLER *v.* MANLIN SERVICE CORP. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5816. BIN-RILLA, AKA PRESTON *v.* ISRAEL, WARDEN. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certificate Dismissed

No. 80–444. FOLEY, DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. Certificate from the United States Court of Appeals for the District of Columbia Circuit dismissed.

Miscellaneous Orders

No. A–420. ROYSE *v.* WASHINGTON ET AL. Application for bail and/or writ of habeas corpus, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–484 (80–5808). OLIVER *v.* MARKS, CORRECTION COMMISSIONER, ET AL. D. C. E. D. Pa. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–521. NOE *v.* UNITED STATES. Application for bail pending appeal, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–530. ARIZONA ET AL. *v.* PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA ET AL. C. A. 9th Cir. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. 79–1252. CALIFORNIA ET AL. *v.* SIERRA CLUB ET AL.; and

No. 79–1502. KERN COUNTY WATER AGENCY ET AL. *v.* SIERRA CLUB ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 818.] Motion of Contra Costa County Water Agency et al. for leave to file a brief as *amici curiae* granted.

No. 79–1423. WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction noted, *ante*, p. 817.] Motion of American Council of Life Insurance for leave to file a brief as *amicus curiae* granted.

No. 79–1538. ANDRUS, SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL.; and

No. 79–1596. VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. D. C. W. D. Va. [Probable jurisdiction noted, *ante*, p. 817.] Motions of Pike County, Kentucky, and Coal Operators & Associates, Inc., for leave to participate in oral argument as *amici curiae* denied.

No. 79–1734. PARRATT ET AL. *v.* TAYLOR. C. A. 8th Cir. [Certiorari granted, *ante*, p. 917.] Motion of respondent to dismiss the writ of certiorari denied.

No. 79–1794. MICHIGAN *v.* SUMMERS. Sup. Ct. Mich. [Certiorari granted, *ante*, p. 898.] Motion of the Solicitor General for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Respondent also allotted an additional 10 minutes for oral argument.

No. 79–1943. ALESSI ET AL. *v.* RAYBESTOS-MANHATTAN, INC., ET AL. C. A. 3d Cir. [Probable jurisdiction noted, *ante*, p. 949]; and

No. 80–193. BUCZYNSKI ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 950.] Joint motion of appellees in No. 79–1943 and respondent General Motors Corp. in No. 80–193 for divided argument granted. Request for additional time for oral argument denied. Motion of American Association of Retired Persons et al. for leave to file a brief as *amici curice* granted. Motions of Merl D. Stong et al. and Gray Panthers for leave to file briefs as *amici curiae* in No. 80–193 granted.

No. 80–54. ITT GILFILLAN *v.* CLAYTON; and

No. 80–5049. CLAYTON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 950.] Motion of respondents International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 509 for divided argument granted.

No. 80–231. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* INDIANA ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, *ante*, p. 816.] Motion of appellees for additional time for oral argument denied.

No. 80–317. UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH. C. A. 5th Cir. [Certiorari granted, *ante*, p. 950.] Motions of American Council on Education et al. and Equal Employment Advisory Council for leave to file briefs as *amici curiae* granted.

No. 80–456. THOMPSON, SECRETARY, DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON, ET AL. *v.* BERRY ET AL. Sup. Ct. Wash. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–922. MARSHALL, SECRETARY OF LABOR *v.* ALABAMA ET AL. C. A. 5th Cir. Motions of Lutheran Church-Missouri Synod and Grace Baptist Temple, Prattville, Alabama, et al. for leave to file briefs as *amici curiae* granted. Motion of respondents to expedite consideration of the petition for writ of certiorari denied.

No. 80–5700. IN RE PAYTON;

No. 80–5769. IN RE ROBINSON; and

No. 80–5770. IN RE JACKSON. Petitions for writs of mandamus denied.

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No. 80–5780. IN RE BEACH. Petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 80–608. UNITED STATES POSTAL SERVICE *v.* COUNCIL OF GREENBURGH CIVIC ASSNS. ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 490 F. Supp. 157.

Certiorari Granted

No. 80–202. AMERICAN EXPRESS CO. *v.* KOERNER. C. A. 5th Cir. Certiorari granted. Reported below: 615 F. 2d 191.

No. 80–544. FIRST NATIONAL MAINTENANCE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari granted. Reported below: 627 F. 2d 596.

Certiorari Denied. (See also Nos. 80–5725, 80–5781, and 80–5816, *supra.*)

No. 79–1180. DUPLANTIER ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 654.

No. 79–1841. GRANDDAD BREAD, INC. *v.* CONTINENTAL BAKING CO. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1105.

No. 79–2065. HORWITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 1101.

No. 80–227. COLE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 384 So. 2d 374.

No. 80–302. KIMPEL *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 78 Ill. App. 3d 929, 397 N. E. 2d 926.

No. 80–304. MASSARELLA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 80 Ill. App. 3d 552, 400 N. E. 2d 436.

No. 80–343. LEWIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–356. INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. D. C. Cir. Certiorari denied.

No. 80–387. HARDING, DAHM & CO., INC. *v.* LIGHTSEY. C. A. 7th Cir. Certiorari denied. Reported below: 623 F. 2d 1219.

No. 80–388. STEPNEY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 181 Conn. 268, 435 A. 2d 701.

No. 80–402. J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 322.

No. 80–403. GOULD, DBA BROKERS FOR AGRICULTURAL COOPERATIVE ASSNS. *v.* INTERSTATE COMMERCE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 847.

No. 80–428. MANGES ET AL. *v.* COUNTY OF DUVAL ET AL. Ct. Civ. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 587 S. W. 2d 436.

No. 80–436. TURKISH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 2d 769.

No. 80–437. ARSHAL *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 223 Ct. Cl. 179, 621 F. 2d 421.

No. 80–443. REEVES *v.* INTERNATIONAL TELEPHONE & TELEGRAPH CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1342.

No. 80–459. DUNCAN ET AL. *v.* PENINGER. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 486.

No. 80–486. KARAS *v.* UNITED STATES; and
No. 80–490. PECORA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 500.

No. 80–496. BURNS ET AL. *v.* GULF OIL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 81.

No. 80–497. TOWRY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 568.

No. 80–528. SAVARESE *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 298.

No. 80–535. CONCERNED PARENTS & CITIZENS FOR THE CONTINUING EDUCATION AT MALCOLM X (P. S. 79) ET AL. *v.* NEW YORK CITY BOARD OF EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 751.

No. 80–541. COUNTY OF FAIRFAX, VIRGINIA, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 629 F. 2d 932.

No. 80–573. SMITH, ADMINISTRATRIX *v.* CHESAPEAKE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1101.

No. 80–583. WHEELING-PITTSBURGH STEEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 618 F. 2d 1009.

No. 80–594. AMERADA HESS CORP. *v.* UNITED STATES; and
No. 80–605. KAYO OIL CO. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 461.

No. 80–598. JOLY *v.* CREEDON. C. A. 1st Cir. Certiorari denied. Reported below: 634 F. 2d 615.

No. 80–599. JEFFERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 80–611. CIANCIULLI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–618. REFRIGERATED TRANSPORT CO., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 87, 627 F. 2d 546.

No. 80–625. SHAPIRO ET AL. *v.* MIDWEST RUBBER RECLAIMING CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 63.

No. 80–630. GARBER *v.* UNITED STATES; and
No. 80–770. DENUCCI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 626 F. 2d 1144.

No. 80–635. MICHAEL REESE PHYSICIANS & SURGEONS ET AL. *v.* QUERN, DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 2d 764.

No. 80–637. SUNNYSIDE VALLEY IRRIGATION DISTRICT *v.* KITTITAS RECLAMATION DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 95.

No. 80–643. STRATOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 863.

No. 80–646. CONNOR *v.* WARREN, ADMINISTRATOR, ET AL. Sup. Ct. N. J. Certiorari denied.

No. 80–648. EUROPEAN TRADE SPECIALISTS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–650. CONNOR *v.* FLYNN. Sup. Ct. N. J. Certiorari denied.

No. 80–655. NICKOLAOU ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 734.

No. 80–661. GEORGE BANTA CO., INC., BANTA DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 354.

No. 80–670. WIDMER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 1065, 424 N. Y. S. 2d 310.

No. 80–672. FOXX *v.* DISTRICT COURT OF THE STATE OF NEVADA FOR THE EIGHTH JUDICIAL DISTRICT (FOXX, REAL PARTY IN INTEREST). Sup. Ct. Nev. Certiorari denied.

No. 80–674. LAREDO PACKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 593.

No. 80–680. WERNER *v.* UPJOHN CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 848.

No. 80–683. CONSOLIDATED FARMERS MUTUAL INSURANCE CO. ET AL. *v.* ANCHOR SAVINGS ASSN. ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–684. PERLUSS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 2d 1371.

No. 80–686. MORRISON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 275 Pa. Super. 454, 418 A. 2d 1378.

No. 80–688. CORPORACION VENEZOLANA DE FOMENTO *v.* MERBAN CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 786.

No. 80–690. HATTEN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 80–694. WOOD *v.* WOOD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 379 So. 2d 220.

No. 80–695. PAYNE *v.* WEINSTOCK. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 380 So. 2d 591.

No. 80–700. ROWRY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–703. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1105.

No. 80–706. INDUSTRIAL TILE, INC. *v.* STEWART ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 388 So. 2d 171.

No. 80–707. BRADY *v.* DOE. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 598 S. W. 2d 338.

No. 80–708. CATENA *v.* CAPITOL INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 190.

No. 80–711. RITTENHOUSE CONSULTING ENTERPRISES, LTD., ET AL. *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 996.

No. 80–712. ABDELLA *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 94 Wis. 2d 694, 289 N. W. 2d 372.

No. 80–713. HURON DIE CASTING, INC., ET AL. *v.* CREDITORS' COMMITTEE OF HURON DIE CASTING, INC. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1090.

No. 80–718. HEWITT ET AL. *v.* CITY OF ESCONDIDO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 107 Cal. App. 3d 78, 165 Cal. Rptr. 545.

No. 80–721. ELDER, DBA VORPAL GALLERIES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 310.

No. 80–723. PATRICELLI *v.* MECCA LTD. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 205.

No. 80–724. MCCUTCHEON *v.* BOARD OF EDUCATION OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied.

No. 80–729. OWEN, ADMINISTRATOR *v.* MESERVE ET AL., TRUSTEES. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 381 Mass. 273, 408 N. E. 2d 867.

No. 80–736. SPENCE *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 896.

No. 80–740. ECKMAN *v.* UNITED STATES;

No. 80–5484. BLUM *v.* UNITED STATES; and

No. 80–5491. MACHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 80–740, 631 F. 2d 725; Nos. 80–5484 and 80–5491, 631 F. 2d 726.

No. 80–743. SHAPIRO ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 170.

No. 80–744. ARCINIEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80–748. ROOT *v.* WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 866.

No. 80–755. DESIMONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–774. HUGHES AIRCRAFT CO. ET AL. *v.* MESSERSCHMITT-BOELKOW-BLOHM, GMBH. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 580.

No. 80–775. CIAFFONI ET AL. *v.* COWDEN ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 491 Pa. 46, 417 A. 2d 1136.

No. 80–787. DINKIN *v.* GANEA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 80–790. HAZARD *v.* HAZARD. Ct. App. N. C. Certiorari denied. Reported below: 46 N. C. App. 280, 264 S. E. 2d 908.

No. 80–796. ZICARELLI *v.* DIETZ, CHAIRMAN, NEW JERSEY PAROLE BOARD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 312.

No. 80–799. MASELLI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 182 Conn. 66, 437 A. 2d 836.

No. 80–800. BIOMETRIC AFFILIATED RESEARCH LABORATORIES, INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–803. GREENAWALT ET AL. *v.* PAWLAK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 628 F. 2d 826.

No. 80–807. BLUMBERG ET AL. *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. Ct. App. Md. Certiorari denied. Reported below: 288 Md. 275, 418 A. 2d 1155.

No. 80–811. LONG ET AL. *v.* ARCELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 1145.

No. 80–825. BITHONEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 631 F. 2d 1.

No. 80–826. TINARI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 631 F. 2d 17.

No. 80–829. DEL GENIO *v.* UNITED STATES BUREAU OF PRISONS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 644 F. 2d 585.

No. 80–855. ANTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 633 F. 2d 1252.

No. 80–856. MURRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–867. JACKSTADT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–882. EDLER INDUSTRIES, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–888. ROWBOTHAM *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80–899. PERLSTEIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 632 F. 2d 661.

No. 80–909. TERCERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 190.

No. 80–910. CALAVO GROWERS OF CALIFORNIA *v.* GENERALI BELGIUM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 963.

No. 80–912. SISK *v.* UNITED STATES; and

No. 80–917. BENSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 629 F. 2d 1174.

No. 80–916. DINARDI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 218.

No. 80–5136. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–5219. MIMS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 384 So. 2d 1377.

No. 80–5232. HIRTZER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5269. BOULWARE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 80–5282. MITCHELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 300 N. C. 305, 266 S. E. 2d 605.

No. 80–5306. BREWER *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 51.

No. 80–5324. PARK *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 81 Ill. App. 3d 108, 400 N. E. 2d 966.

No. 80–5327. BAXTER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1030.

No. 80–5338. SPARKS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 386 So. 2d 364.

No. 80–5339. DEVINE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 80–5353. BARTH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 95 Wis. 2d 740, 293 N. W. 2d 180.

No. 80–5379. WALKER *v.* LOCKHART, CORRECTION DIRECTOR. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 683.

No. 80–5381. COPELAND *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 292 N. W. 2d 878.

No. 80–5388. TINSLEY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 181 Conn. 388, 435 A. 2d 1002.

No. 80–5398. WILKS *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 2d 32.

No. 80–5405. SOTO-MATOS *v.* FAUVER, CORRECTIONS COMMISSIONER, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–5410. BURGOS *v.* FOLLETTE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 80–5429. DEGIDEO *v.* ALTEMOSE CONSTRUCTION CO. C. A. 3d Cir. Certiorari denied.

No. 80–5470. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 483.

No. 80–5481. WILKINS *v.* HINTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 864.

No. 80–5494. BRYANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1097.

No. 80–5498. WHITFIELD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 102, 629 F. 2d 136.

No. 80–5499. KEITH *v.* BORDENKIRCHER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1349.

No. 80–5504. FRAZIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 728.

No. 80–5510. ARRINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 1119.

No. 80–5511. SULLIVAN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 294.

No. 80–5516. ELCAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5517. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 729.

No. 80–5518. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 2d 350.

No. 80–5531. YOST *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5570. LYLES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1095.

No. 80–5577. WILEY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 228 Kan. cxciii, 615 P. 2d 773.

No. 80–5606. EDWARDS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 83 Ill. App. 3d 128, 403 N. E. 2d 771.

No. 80–5610. LESS *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5612. IN RE GAMBARA. Sup. Ct. Ill. Certiorari denied.

No. 80–5622. HOOVER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 603 S. W. 2d 882.

No. 80–5623. PENA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 400, 406 N. E. 2d 1347.

No. 80–5624. WATSON *v.* MICHAEL I. SCHAFFER CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5626. ALEXANDER *v.* WEST VIRGINIA BOARD OF PROBATION AND PAROLE. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5627. MILES *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1091.

No. 80–5629. BARNES *v.* CUPP, PENITENTIARY SUPERINTENDENT. Ct. App. Ore. Certiorari denied. Reported below: 44 Ore. App. 533, 606 P. 2d 664.

No. 80–5634. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 80–5636. MITCHELL *v.* SMITH, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 1009.

No. 80–5639. HAMMITT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80–5641. DOE *v.* WEST ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1222.

No. 80–5646. SMITH *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 626.

No. 80–5650. GONZALEZ *v.* HAMMOCK, CHAIRMAN, NEW YORK STATE BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 844.

No. 80–5652. ARTHUR *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 735, 269 S. E. 2d 887.

No. 80–5654. WILLIAMS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 602 S. W. 2d 148.

No. 80–5657. BARNER *v.* STEPHENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 727.

No. 80–5666. PHARR *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 629 F. 2d 1278.

No. 80–5667. GRAY *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 80–5678. HYDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 618 F. 2d 411.

No. 80–5679. THOMAS *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 1375.

No. 80–5682. MCNEAL *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5684. BEAVEN *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5685. WHITE *v.* BLOOM ET AL. C. A. 8th Cir. Certiorari denied.

No. 80–5686. ARCHIE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 97 Wis. 2d 753, 295 N. W. 2d 225.

No. 80–5687. PLIES *v.* PINE TREE MOTEL, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5691. GIBSON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 381 Mass. 372, 409 N. E. 2d 741.

No. 80–5692. BOYD *v.* CITY AND COUNTY OF DENVER, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5698. WILLIAMSON *v.* DAVIS, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1012.

No. 80–5703. MCGUGAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–5704. MCGEE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1206.

No. 80–5706. COCHRAN *v.* CITY OF AKRON. Ct. App. Ohio, Summit County. Certiorari denied.

No. 80–5709. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 628.

No. 80–5710. AILLON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 182 Conn. 124, 438 A. 2d 30.

No. 80–5714. EVANS *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 214.

No. 80–5716. BALOUN ET AL. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 213.

No. 80–5720. STOVER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 389 So. 2d 1109.

No. 80–5721. MEREDITH *v.* SMITH, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 217.

No. 80–5731. NORRIS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 408 Mich. 857.

No. 80–5732. ROSEMAN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–5733. HUDSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 736.

No. 80–5734. JOHNSON *v.* CUYAHOGA COUNTY, INC., OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 216.

No. 80–5735. BUCHANAN *v.* SEARCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 213.

No. 80–5736. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 80–5737. PARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–5738. NAPOLEON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–5739. AMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 2d 237.

No. 80–5744. FRAZIER, AKA BEACHUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–5745. ATKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–5749. MARTINEZ *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 618.

No. 80–5753. ROUSE *v.* UNITED STATES; and
No. 80–5754. ADDERLY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 80–5753, 633 F. 2d 212; No. 80–5754, 633 F. 2d 211.

No. 80–5756. FORD *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5759. BERZITO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 80–5760. ROBERTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 239.

No. 80–5761. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 494.

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No. 80–5766. SIMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1092.

No. 80–5771. CHIPMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 211.

No. 80–5772. DUKES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–5774. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–5776. HAMMORK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1358.

No. 80–5784. BINGHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 548.

No. 80–5786. DOZIER *v.* SOWDERS, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–5788. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 1309.

No. 80–5792. JOHL *v.* TOWN OF GROTON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 80–5797. ULMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1015.

No. 80–5804. EYRICH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–5806. EMASSAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–5832. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 1353.

No. 80–5837. IQBAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1220.

No. 80–5838. FERRELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 776.

No. 80–5843. HINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 507.

No. 80–5844. ZITEK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 2d 940.

No. 80–5866. PROCA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 223.

No. 80–5867. VASQUEZ-MORALES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 733.

No. 79–1922. CENTRAL OF GEORGIA RAILROAD CO. *v.* HENDLEY. C. A. 5th Cir. Motion of National Railway Labor Conference for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 609 F. 2d 1146.

No. 79–2014. ANDERSON ET AL. *v.* WINSETT. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE would grant certiorari and reverse the judgment summarily. Reported below: 617 F. 2d 996.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979), we held that a Nebraska statute created an "expectancy of release [on parole]" that was "entitled to some measure of constitutional protection." The Nebraska statute provided in part:

> "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release *unless* it is of the opinion that his release should be deferred because:
>
> "(a) There is a substantial risk that he will not conform to the conditions of parole;

"(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

"(c) His release would have a substantially adverse effect on institutional discipline; or

"(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." [1]

We emphasized that our decision rested on the "unique structure and language" of the Nebraska statute and cautioned that whether any other state statute created a liberty interest would have to be decided on a case-by-case basis. *Ibid.*

In this case respondent, a Delaware state prisoner, filed suit against petitioners, state prison officials, alleging that petitioners violated his due process rights when they denied him work release. The Court of Appeals for the Third Circuit examined the Delaware statutory provisions and regulations governing work release programs in light of *Greenholtz* and concluded that a liberty interest was implicated when respondent was denied work release. The court conceded that Delaware prison officials exercise substantial discretion in making work release decisions but concluded that their discretion is not unbounded. It determined that under Delaware law prison officials must exercise their discretion "consistently with the purpose and policy behind work release." [2] The court also observed that the State had established "an elaborate institutional system" for processing work release applications.[3] Two separate committees must evaluate the inmate's fitness for work release and recommend that work release be granted before the inmate's application may be sub-

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[1] Neb. Rev. Stat. § 83-1,114 (1) (1976) (emphasis added). See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S., at 11.

[2] *Winsett* v. *McGinnes*, 617 F. 2d 996, 1007 (1980) (en banc).

[3] *Id.*, at 1006.

mitted to the prison superintendent. In light of this three-tier review system, the court concluded that the superintendent could not reject work release applications for reasons that were unrelated to the purposes of the work release program. Since Delaware prison officials do not have unlimited discretion to deny work release to an inmate who meets the basic criteria for eligibility, the Court of Appeals held that under *Greenholtz* respondent had established an "expectancy of [work] release" that was entitled to constitutional protection.[4] The court clearly rejected the view expressed in the dissenting opinion that respondent could not prevail under the standard established in *Greenholtz* since Delaware law does not provide that an eligible inmate *shall* be granted work release *unless* prison authorities determine, based on certain statutory criteria, that work release ought to be denied.

We did not expressly state in *Greenholtz* that the "shall . . . unless" language of the Nebraska statute was the critical factor underlying our determination that the statute created a liberty interest. However, other Courts of Appeals have examined parole release statutes lacking mandatory language and have concluded in light of *Greenholtz* that those statutes do not create liberty interests. See *Wagner* v. *Gilligan*, 609 F. 2d 866 (CA6 1979); *Boothe* v. *Hammock*, 605 F. 2d 661 (CA2 1979); *Shirley* v. *Chestnut*, 603 F. 2d 805 (CA10 1979).[5]

I believe this Court should grant certiorari to clarify the

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[4] The court distinguished this case from *Meachum* v. *Fano*, 427 U. S. 215 (1976), in which we rejected the respondent state prisoners' argument that they had a constitutionally protected liberty interest in remaining in particular prisons. The state statute involved in *Meachum* permitted prison officials to transfer prisoners to other state correctional institutions "for whatever reason or for no reason at all." *Id.*, at 228.

[5] The Court of Appeals for the Ninth Circuit has stated that the presence of mandatory language is an important factor to be considered in determining whether a statute creates a liberty interest. *Bowles* v. *Tennant*, 613 F. 2d 776, 778 (1980).

implications of the *Greenholtz* decision by considering whether the Delaware statute and regulations involved in this case created a constitutionally protected liberty interest.

No. 79–2059. AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* CITY OF MISHAWAKA, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 616 F. 2d 976.

No. 80–174. CALIFORNIA *v.* PATRICK STEVEN W. Ct. App. Cal., 2d App. Dist. Certiorari denied. THE CHIEF JUSTICE would grant certiorari and reverse the judgment. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 104 Cal. App. 3d 615, 163 Cal. Rptr. 848.

No. 80–233. MICHIGAN *v.* WALTON. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 80–382. GENERAL PUBLIC UTILITIES CORP. ET AL. *v.* SUSQUEHANNA VALLEY ALLIANCE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 619 F. 2d 231.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

In this case the Court of Appeals for the Third Circuit held that a private party seeking to compel agency compliance with the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, need not exhaust administrative remedies prior to filing suit in Federal District Court. Because I believe that a long series of our cases heretofore regarded as settled law require such exhaustion, *e. g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), I dissent from the denial of the petition for certiorari and would set the case for argument.

The case arises out of the effort of the Nuclear Regulatory

Commission and petitioners, the owners and operators of Three Mile Island Nuclear Station, to treat and eventually dispose of radioactive wastewater resulting from the accident occurring at Three Mile Island in March 1979. In May 1979, respondents commenced this action against the Commission and petitioners, alleging that the Commission had approved petitioners' construction and operation of a facility to decontaminate the radioactive wastewater, known as EPICOR II, and planned to allow the processed water to be discharged in the Susquehanna River. Specifically, respondents alleged that the Commission had failed to prepare an environmental impact statement for the EPICOR II system, in violation of NEPA, 42 U. S. C. § 4332, and had failed to require petitioners to secure a license or construction permit for the system, in violation of the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U. S. C. § 2011 *et seq.* The complaint also charged that the possible discharge of "high-level radioactive" water into the river would violate both the Federal Water Pollution Control Act (FWPCA), § 301 (f), 86 Stat. 846, 33 U. S. C. § 1311 (f), and a federal constitutional right to "be born and to live mentally and physically unimpaired."

The District Court found that respondents had failed to exhaust their administrative remedies under the Atomic Energy Act and dismissed the complaint for lack of subject-matter jurisdiction. It noted that the administrative remedy available under the Act, 10 CFR § 2.206 (1980),[1] "allows

[1] Title 10 CFR § 2.206 (1980) provides in relevant part:

"(a) Any person may file a request for the Director of Nuclear Reactor Regulation . . . to institute a proceeding . . . to modify, suspend or revoke a license, or for such other action as may be proper. . . .

"(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director . . . shall either institute the requested proceeding in accordance with the subpart or shall advise the person who made the request in writing that no proceeding will be

plaintiffs to ask the [Commission] for all the relief sought in this court." It further noted that the Act makes any final decision of the Commission reviewable exclusively in the courts of appeals. 42 U. S. C. § 2239 (b) and 28 U. S. C. § 2342.

The Court of Appeals affirmed in part and reversed in part. Although it affirmed the District Court's dismissal of claims arising under the Atomic Energy Act on the grounds that the Commission has exclusive jurisdiction over licensing actions, 42 U. S. C. § 2239 (b), and that private parties may not judicially enforce the Act, 42 U. S. C. § 2271 (c), it nonetheless found that the District Court had jurisdiction to *compel* Commission compliance with NEPA. It reasoned that where the Commission "fragments" its environmental review of projects, as is allegedly the case here, the district courts could prohibit such fragmentation. The court went on to hold that the District Court had jurisdiction over respondents' FWPCA and constitutional claims, reasoning that respondents had satisfied the conditions of the FWPCA's citizen-suit provision, 33 U. S. C. § 1365 (a), and that the District Court was the "appropriate" forum to consider the constitutional claims.

Petitioners contend, correctly in my view, that the decision below ignored the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp., supra,* at 50–51; *McKart* v. *United States,* 395 U. S. 185, 193, 195 (1969). Even the Solicitor General, who does not seek certiorari in this case, "agrees with petitioners that the [C]ourt of [A]ppeals erred in a number of its rulings and that its decision is contrary to the prior decisions of this Court." Memorandum for United States Nuclear Regulatory Commission 1.

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instituted in whole or in part, with respect to his request, and the reasons therefor."

The gist of petitioners' argument is that Congress has placed with the Commission the authority to regulate its licensees' handling of radioactive materials and has limited judicial review of the Commission's decisions to the courts of appeals. This Court has recognized that the adequacy of Commission compliance with NEPA, not just with the Atomic Energy Act, is reviewable solely in the courts of appeals pursuant to 42 U. S. C. § 2239 (b) and 28 U. S. C. § 2342. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519, 526–527 (1978). Indeed, the decision below is in direct conflict with a decision of the Court of Appeals for the District of Columbia Circuit which held that where a statutory review procedure assigns to the courts of appeals exclusive review responsibility over agency action—as does the Atomic Energy Act—a district court may not exercise concurrent jurisdiction to resolve allegations of agency noncompliance with NEPA. *City of Rochester* v. *Bond*, 195 U. S. App. D. C. 345, 354–355, 603 F. 2d 927, 936–937 (1979).

The "fragmentation" of judicial review in this case results not from the action of the Commission, but from the decision below which splinters judicial review of claims that arise essentially out of the same factual setting. It is anomalous to hold, as did the court below, that the Atomic Energy Act claims are reviewable exclusively in the Court of Appeals, while claims arising under NEPA, FWPCA, and the Constitution are reviewable originally in the District Court.[2] The

[2] Although it is clear that the court below erred with respect to the NEPA claim, I suggest that it is on no firmer footing with respect to the FWPCA and constitutional claims. It appears, for example, that the Commission has exclusive jurisdiction to regulate the discharge of the type of radioactive water involved in this case, see *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 16–17 (1976). In any event, all of the claimed violations arise out of the very activities which are subject to Commission regulatory control, and considerations of judicial economy require that all of the claims be resolved in the first instance by the Commission.

decision below means that the District Court, the Court of Appeals, and the Commission will all exercise concurrent jurisdiction over the same claims at the same time. Such a trifurcated review procedure is not only inefficient, duplicating judicial and administrative effort, but more importantly, it leads to premature interference with agency processes, contrary to the policy underlying direct review statutes.[3]

Although the Solicitor General concedes that the decision below was wrong, he asserts that the case is not worthy of this Court's attention because the decision will be regarded merely as an "anomaly that cannot be reconciled with this Court's settled teaching on exhaustion of administrative remedies." Memorandum for United States Nuclear Regulatory Commission 5. I am not so sanguine. I fear that unless accorded plenary review here the decision below will spawn

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[3] The problems of segregated review are amply illustrated by the facts of this case. On May 25, 1979, the same day suit was filed in this case, the Commission issued a statement prohibiting the treatment or discharge of contaminated water until it had completed an environmental assessment. During the next several months, the Commission staff prepared an environmental assessment on the proposed operation of EPICOR II. The Commission eventually published a draft Environmental Impact Statement, 45 Fed. Reg. 54495 (1980), and issued an opinion on October 16, 1980, permitting the processing of radioactive wastewater by EPICOR II, but specifically prohibiting any discharge of the processed water pending further study. Respondents subsequently filed a petition for review of that order in the Court of Appeals for the Third Circuit pursuant to 42 U. S. C. § 2239. That case raises the same NEPA issues presented in this case. Thus, the District Court, the Court of the Appeals for the Third Circuit, and the Commission are presently exercising concurrent jurisdiction over the same issues. This sort of procedural chaos is invited by the decision of the Court of Appeals in this case.

What may well be the better course both legally and practically is suggested by a recent case in the District Court for the District of Columbia which raised virtually the same issues presented here. *City of Lancaster* v. *NRC*, No. 79–1368. There the court dismissed with prejudice plaintiffs' suit on the basis, *inter alia*, of the Commission's adherence to its May 25, 1979, statement.

others like it allowing circumvention of agency review and pursuit of NEPA claims directly in the district courts. Accordingly, I dissent from the denial of the petition for certiorari.

No. 80–410. WASSERMAN, TRUSTEE *v.* WASHINGTON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 623 F. 2d 1169.

No. 80–747. MICHIGAN *v.* ANDERSON. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 409 Mich. 474, 295 N. W. 2d 482.

No. 80–872. ILLINOIS *v.* SAVORY. App. Ct. Ill., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 82 Ill. App. 3d 767, 403 N. E. 2d 118.

No. 80–293. UNITEX LTD. ET AL. *v.* DAN RIVER, INC. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 624 F. 2d 1216.

No. 80–499. WILLIAMS ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. 9th Cir. Motion of Teamsters for a Democratic Union et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below; 617 F. 2d 1321.

No. 80–529. CALGON CORP. *v.* DAVIS. C. A. 3d Cir. Certeriorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 627 F. 2d 674.

No. 80–730. HELERINGER *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 602 S. W. 2d 165.

No. 80–628. COWLES COMMUNICATIONS, INC. *v.* ALIOTO. C. A. 9th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 623 F. 2d 616.

No. 80–521. LOUDOUN TIMES-MIRROR ET AL. *v.* ARCTIC CO., LTD., T/A IROQUOIS RESEARCH INSTITUTE. C. A. 4th Cir. Motion of Reporters' Committee for Freedom of the Press et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 624 F. 2d 518.

No. 80–788. ADAMS EXTRACT CO. ET AL. *v.* FRANEY ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 1086.

No. 80–620. AYOOB ET AL. *v.* MORRISON ET AL. C. A. 3d Cir. Motions of Pennsylvania Bar Association, Pennsylvania Conference of Trial Judges, and Alexander F. Barbieri for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 627 F. 2d 669.

No. 80–791. BLITSTEIN *v.* UNITED STATES. C. A. 10th Cir. Motion of National Association of Criminal Defense Lawyers, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 626 F. 2d 774.

No. 80–5098. GREEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 611 P. 2d 262.

No. 80–5307. LIVINGSTON *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 614 P. 2d 1118.

No. 80–5520. MASSIE *v.* SUMNER, WARDEN. C. A. 9th Cir.;

No. 80–5565. WILLIAMS *v.* LOUISIANA. Sup. Ct. La.;

No. 80–5605. SHRINER *v.* FLORIDA. Sup. Ct. Fla.;

No. 80–5644. PEEK *v.* ZANT, WARDEN. Sup. Ct. Ga.;

No. 80–5672. COLLINS *v.* GEORGIA. Sup. Ct. Ga.;

No. 80–5674. HAMILTON *v.* GEORGIA. Sup. Ct. Ga.;

No. 80–5715. CLARK *v.* LOUISIANA. Sup. Ct. La.;

No. 80–5751. BALDWIN *v.* LOUISIANA. Sup. Ct. La.; and

No. 80–5778. WILSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 80–5520, 624 F. 2d 72; No. 80–5565, 383 So. 2d 369; No. 80–5605, 386 So. 2d 525; No. 80–5672, 246 Ga. 261, 271 S. E. 2d 352; No. 80–5674, 246 Ga. 264, 271 S. E. 2d 173; No. 80–5715, 387 So. 2d 1124 and 389 So. 2d 1335; No. 80–5751, 388 So. 2d 664; No. 80–5778, 246 Ga. 62, 268 S. E. 2d 895.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1820. BADGER *v.* UNITED STATES ET AL., *ante*, p. 889;

No. 79–1857. ALCOA STEAMSHIP CO., INC. *v.* M/V NORDIC REGENT ET AL., *ante*, p. 890;

No. 79–2047. SIMMONS *v.* IOWA ET AL., *ante*, p. 842;

No. 79–6704. WESTBROOK *v.* BALKCOM, WARDEN, *ante*, p. 999;

No. 79–6715. CULBERSON *v.* MISSISSIPPI, *ante*, p. 986;

No. 79–6872. THOMAS *v.* MUSKIE, SECRETARY OF STATE, ET AL., *ante*, p. 982; and

No. 79–6873. THOMAS *v.* MUSKIE, SECRETARY OF STATE, ET AL., *ante*, p. 982. Petitions for rehearing denied.

No. 79–6884. FAIR *v.* GEORGIA, *ante*, p. 986;

No. 80–137. DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT OF LOUISIANA *v.* BEAIRD-POULAN, INC., *ante*, p. 971;

No. 80–166. COLBY *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 900;

No. 80–296. EMPRESAS ELECTRONICAS WALSER, INC., ET AL. *v.* UNITED STATES, *ante*, p. 953;

No. 80–313. SUTTON *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS, *ante*, p. 944;

No. 80–321. STONE ET AL. *v.* GRAHAM, SUPERINTENDENT OF PUBLIC INSTRUCTION OF KENTUCKY, *ante*, p. 39;

No. 80–322. KORN *v.* OHIO, *ante*, p. 944;

No. 80–334. SILVERMAN *v.* UNITED STATES, *ante*, p. 954;

No. 80–344. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL., *ante*, p. 954;

No. 80–345. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL., *ante*, p. 954;

No. 80–438. GRAYDON *v.* PASADENA REDEVELOPMENT AGENCY ET AL. (HAHN, INC., REAL PARTY IN INTEREST), *ante*, p. 983;

No. 80–556. CENTRAL LIQUOR CO. ET AL. *v.* UNITED STATES, *ante*, p. 1022;

No. 80–5061. O'CONNOR ET UX. *v.* PALLUDAN CORP., *ante*, p. 944;

No. 80–5151. BAUN *v.* CIVILETTI, ATTORNEY GENERAL, ET AL., *ante*, p. 957;

No. 80–5256. SANDERS ET AL. *v.* HANKINS, *ante*, p. 959;

No. 80–5308. BECKER *v.* EVANS, *ante*, p. 944;

No. 80–5356. BLAKNEY *v.* SCHOOL DISTRICT OF PHILADELPHIA, *ante*, p. 985;

No. 80–5357. BLAKNEY *v.* SCHOOL DISTRICT OF PHILADELPHIA, *ante*, p. 985; and

No. 80–5384. WOODARD *v.* WACHOVIA BANK & TRUST CO. ET AL., *ante*, p. 996. Petitions for rehearing denied.

No. 80–5404. PANA *v.* CUYLER ET AL., *ante*, p. 961;

No. 80–5406. JOHL *v.* PERKINS, *ante*, p. 996;

No. 80–5407. PATTERSON *v.* MERCER ET AL., *ante*, p. 996;

No. 80–5408. PETERS *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. ET AL., *ante*, p. 996;

No. 80–5427. ROBERTS *v.* MCCOY ET AL., *ante*, p. 977;

No. 80–5440. SHAO FEN CHIN, ADMINISTRATOR *v.* ST. LUKE'S HOSPITAL CENTER ET AL., *ante*, p. 988;

No. 80–5528. CONRAD *v.* RODINO, MEMBER OF CONGRESS, ET AL., *ante*, p. 977;

No. 80–5529. CONRAD *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 977; and

No. 80–5532. MAHL *v.* BOARD OF TRUSTEES OF FIRE FIGHTERS PENSION AND RELIEF FUND FOR THE CITY OF NEW ORLEANS, *ante*, p. 1019. Petitions for rehearing denied.

No. 80–337. ROBERTS *v.* SEARS, ROEBUCK & CO., *ante*, p. 975. Petition for rehearing denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 79–1750. FINGAR *v.* SEABOARD COAST LINE RAILROAD CO., *ante*, p. 887; and

No. 80–297. HOLDING *v.* BVA CREDIT CORP. ET AL., *ante*, p. 975. Petitions for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 79–6562. KULWIEC *v.* AIR LINE PILOTS ASSN., *ante*, p. 850; and

No. 79–6727. KULWIEC *v.* UNITED AIR LINES, INC., *ante*, p. 858. Motion for leave to file petition for rehearing denied.

JANUARY 19, 1981

Order Appointing Clerk

It is ordered that Alexander L. Stevas be appointed Clerk of this Court to succeed Michael Rodak, Jr., effective at the commencement of business January 17, 1981, and that he take the oath of office as required by statute.

Order Appointing Chief Deputy Clerk

It is ordered that Francis J. Lorson be appointed Chief Deputy Clerk of this Court to succeed Alexander L. Stevas effective at the commencement of business January 17, 1981, and that he take the oath of office as required by statute.

Appeal Dismissed

No. 80–806. DROCIAK *v.* SUPREME COURT OF NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded. (See also No. 80–5618, *ante,* p. 405.)

No. 80–431. MCALPIN ET AL. *v.* ARMSTRONG, RECEIVER, ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded with instructions that the appeal be dismissed. *Firestone Tire & Rubber Co.* v. *Risjord, ante,* p. 368. Reported below: 625 F. 2d 433.

Miscellaneous Orders

No. A–576. O'HAIR ET AL. *v.* COOKE ET AL. C. A. 5th Cir. Application for a temporary injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–199. IN RE DISBARMENT OF FISCHER. Disbarment entered. [For earlier order herein, see *ante,* p. 989.]

No. D–204. IN RE DISBARMENT OF SCHLATER. Disbarment entered. [For earlier order herein, see *ante,* p. 989.]

No. D–214. IN RE DISBARMENT OF TOOMEY. It is ordered that Regis Lee Toomey of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–210. IN RE DISBARMENT OF BURKA. Disbarment entered. [For earlier order herein, see *ante*, p. 990.]

No. D–215. IN RE DISBARMENT OF LONG. It is ordered that George Wayne Long of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–216. IN RE DISBARMENT OF MEHTA. It is ordered that Mahendra R. Mehta of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–217. IN RE DISBARMENT OF DOUGLAS. It is ordered that George R. Douglas, Jr., of Bethesda, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion of Columbia Gas Transmission Corp. et al. for leave to file a response to Louisiana's reply granted. JUSTICE POWELL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 1058.]

No. 79–1144. TEXAS INDUSTRIES, INC. *v.* RADCLIFF MATERIALS, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 949.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Petitioner also allotted an additional 10 minutes for oral argument. Motion of Mead Corp. for leave to participate in oral argument as *amicus curiae* denied.

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No. 79–1711. MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1754. JOINT MEETING OF ESSEX AND UNION COUNTIES *v.* NATIONAL SEA CLAMMERS ASSN. ET AL;

No. 79–1760. CITY OF NEW YORK ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.; and

No. 80–12. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 917.] Motion of petitioners in No. 79–1754 for additional time for oral argument and for designation of counsel to argue on behalf of the nonfederal parties denied. Motion of petitioners in No. 79–1711 for designation of counsel to argue on behalf of the nonfederal parties denied.

No. 79–1777. COMPLETE AUTO TRANSIT, INC., ET AL. *v.* REIS ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 898.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 79–1944. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. [Certiorari granted, *ante*, p. 819.] Motion of Cessna Aircraft Co. for leave to file a brief as *amicus curiae* granted.

No. 80–180. MCDANIEL ET AL. *v.* SANCHEZ ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 898.] Motions of Lawyers' Committee for Civil Rights Under Law and American Civil Liberties Union for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for divided argument granted.

No. 80–429. COUNTY OF WASHINGTON, OREGON, ET AL. *v.* GUNTHER ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 950.] Motion of American Society for Personnel Administration for leave to file a brief as *amicus curiae* granted.

No. 80–827. SCANLON, SECRETARY OF EDUCATION OF PENNSYLVANIA *v.* BATTLE ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–5116. JENKINS *v.* BREWER. C. A. 7th Cir. [Certiorari granted, *ante*, p. 981.] Motions of John Howard Association and National Prison Project et al. for leave to file briefs as *amici curiae* granted.

No. 80–5782. IN RE LOHMANN; and
No. 80–5805. IN RE WATKINS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 78–1789. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. Sup. Ct. La. Certiorari granted. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 368 So. 2d 984.

No. 80–148. ROBBINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 103 Cal. App. 3d 34, 162 Cal. Rptr. 780.

No. 80–780. ROWAN COS., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 624 F. 2d 701.

No. 80–795. HEFFRON, SECRETARY AND MANAGER OF THE MINNESOTA STATE AGRICULTURAL SOCIETY BOARD OF MANAGERS, ET AL. *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., ET AL. Sup. Ct. Minn. Certiorari granted. Reported below: 299 N. W. 2d 79.

No. 80–328. NEW YORK *v.* BELTON. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 50 N. Y. 2d 447, 407 N. E. 2d 420.

No. 80–289. UNITED MINE WORKERS OF AMERICA, LOCAL No. 1854, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 80–692. NATIONAL LABOR RELATIONS BOARD *v.* AMAX COAL CO., A DIVISION OF AMAX, INC., ET AL. C. A. 3d Cir. Certiorari in No. 80–289 granted limited to Question 1 presented by the petition. Certiorari in No. 80–692 granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 614 F. 2d 872.

Certiorari Denied. (See also No. 80–806, *supra.*)

No. 80–315. SOUTH PACIFIC CO. (PACIFIC LINES) *v.* RICHINS ET AL.; and

No. 80–392. BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA ET AL. *v.* RICHINS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 620 F. 2d 761.

No. 80–386. AMERICAN JEWISH CONGRESS ET AL. *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 881, 424 N. Y. S. 2d 338.

No. 80–446. UNION PACIFIC RAILROAD CO. *v.* FLETCHER. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 2d 902.

No. 80–470. AIR LINE PILOTS ASSN., INTERNATIONAL, AFL–CIO *v.* TRANS INTERNATIONAL AIRLINES, INC.;

No. 80–478. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION, ET AL. *v.* TRANS INTERNATIONAL AIRLINES, INC.; and

No. 80–480. TRANS INTERNATIONAL AIRLINES, INC. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AIRLINE DIVISION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 2d 949.

No. 80–516. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* STEVENS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 413 A. 2d 1305.

No. 80–547. WALLIN ET UX. *v.* CITY OF PORT TOWNSEND ET AL. Ct. App. Wash. Certiorari denied. Reported below: 25 Wash. App. 1041.

No. 80–557. RICH *v.* FLORIDA; and ROTH *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 380 So. 2d 591 (first case); 378 So. 2d 794 (second case).

No. 80–577. HOGAN & HARTSON ET AL. *v.* INTERNATIONAL CONTROLS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 204.

No. 80–603. BAKER *v.* UNITED STATES;
No. 80–677. TURNIPSEED ET AL. *v.* UNITED STATES; and
No. 80–678. FARRIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 890.

No. 80–622. AJLOUNY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 830.

No. 80–633. HACKENBERGER, DBA RON'S TRUCKING SERVICE *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 628 F. 2d 966.

No. 80–676. SHARGEL, ATTORNEY ON BEHALF OF ALOI *v.* FENTON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 596 F. 2d 42 and 633 F. 2d 206.

No. 80–699. WELLS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 868.

No. 80–717. KISS *v.* MONMOUTH COUNTY WELFARE BOARD. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–719. HANSHAW *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 80–727. GREAVES ET UX. *v.* DEPARTMENT OF REVENUE OF OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 511, 614 P. 2d 100.

No. 80–731. UPJOHN CO. *v.* TIMM ET VIR. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 536.

No. 80–732. RUCKER CO. *v.* SHELL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 334.

No. 80–750. WARDLE *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 2d 820.

No. 80–752. CARNEY *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–753. MOELLER *v.* BROWNE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 618.

No. 80–761. FRITO-LAY, INC. *v.* LOCAL UNION No. 137, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1354.

No. 80–762. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 978.

No. 80–772. ENVIRONMENTAL DEFENSE FUND, INC. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. Reported below: 203 U. S. App. D. C. 340, 631 F. 2d 922.

No. 80–783. PARK COUNTY, MONTANA, ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 718.

No. 80–789. HAYDEN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 380 So. 2d 588.

No. 80–793. DIXILYN CORP. *v.* RODRIGUE. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 537.

No. 80–797. HART *v.* MAYOR OF BALTIMORE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 625 F. 2d 13.

No. 80–810. GARCIA *v.* GLOOR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 264.

No. 80–915. SCHAFFER *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 346.

No. 80–923. MOORE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1171.

No. 80–925. ROSENTHAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 628.

No. 80–5428. BOWLEG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 80–5433. MILLER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 490 Pa. 457, 417 A. 2d 128.

No. 80–5475. PASSARO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 938.

No. 80–5555. KRAMER *v.* HOPPER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1041.

No. 80–5569. ENGLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 637.

No. 80–5591. PALMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 2d 830.

No. 80–5659. BERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 627 F. 2d 193.

No. 80–5661. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 631 F. 2d 726.

No. 80–5717. WAGNER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80–5741. GAMBLE *v.* HESS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5746. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 203.

No. 80–5747. STIEHL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 585 S. W. 2d 716.

No. 80–5748. COUCH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 606 S. W. 2d 768.

No. 80–5750. MURTAUGH *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 217.

No. 80–5762. LONDON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5765. JACOX *v.* MEMPHIS CITY BOARD OF EDUCATION ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 604 S. W. 2d 872.

No. 80–5767. WHITE *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 80–5773. MASON *v.* EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1350.

No. 80–5777. HOBSON *v.* WESTERN AIRLINES ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5798. WALLACE *v.* CITY OF ROCKY RIVER ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–5812. COSEY ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 82 Ill. App. 3d 968, 403 N. E. 2d 656.

No. 80–5853. WALLACE *v.* McCRONE ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–5877. SHORES *v.* DIRECTOR, UNITED STATES PAROLE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 631 F. 2d 733.

No. 80–5882. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 636 F. 2d 1225.

No. 80–5885. JONES *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 288 Md. 618, 420 A. 2d 1241.

No. 80–474. PROCTER & GAMBLE MANUFACTURING CO. *v.* FISHER. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE would grant certiorari. Reported below: 613 F. 2d 527.

JUSTICE REHNQUIST, dissenting.

The decision by the Court of Appeals for the Fifth Circuit in this case seriously undermines our recent decision in *Teamsters* v. *United States,* 431 U. S. 324 (1977), and accordingly I would grant certiorari.

Respondent, a black employee of petitioner, filed this Title VII action on July 15, 1974, alleging that petitioner discriminated against black employees in promotion decisions at its Dallas, Tex., plant. Pursuant to the provisions of a collective-bargaining agreement, promotions at the plant are based on seniority when the ability and merit of competing employees are approximately equal. For most jobs at the plant, ability and merit are determined by evaluating work performance, absentee record, disciplinary history, and medical condition. Promotion to certain "critical" jobs is governed by the results of an evaluation system known as the

"total assessment process," involving examinations, interviews, and questionnaires. Employees bidding for promotion to one of the critical jobs are ranked, pursuant to this process, as "strong," "acceptable," "borderline," or "weak." The promotion is awarded to the most senior bidder receiving an "acceptable" rating.

In an opinion filed one month prior to our decision in *Teamsters*, the District Court concluded that petitioner's seniority system was not bona fide under § 703 (h) of Title VII, 42 U. S. C. § 2000e–2 (h),[1] and that petitioner had discriminated against respondent and the class he represented. In *Teamsters*, however, we held that an otherwise valid seniority system did not lose its bona fide character simply because its operation may perpetuate past discrimination. On appeal after *Teamsters*, the Court of Appeals acknowledged that the District Court had erred and that petitioner's seniority system was bona fide and legally valid under § 703 (h). 613 F. 2d 527, 542. The court nonetheless "saved" the District Court decision on the ground that it was based not only on the existence of a seniority system which perpetuated past acts of discrimination but also on a finding of active, current discrimination. The support for this finding consisted of statistical evidence demonstrating that black employees "are marked by their conspicuous presence in the 'lower echelons' of the employee hierarchy." *Id.*, at 543.

The difficulty with the lower court's reliance on this statistical evidence of disparate impact to support the ultimately required finding of discriminatory intent is that the court completely failed to consider the effect of the bona fide seniority system on the significance of the statistics. All of

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[1] This provides, in pertinent part:

"[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . ."

the nonmanagement employees with seniority dates predating July 1, 1966, are white. As of January 1, 1977, there were 239 white employees at the plant with more seniority than the most senior black employee. App. to Pet. for Cert. 40a. Thus, despite the highly successful efforts of petitioner to hire blacks [2] the normal operation of the seniority system for promotion results, at least for the present, in the statistical evidence of disparate impact relied upon by the Court of Appeals.

In *Teamsters* we stressed that "the unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII . . . even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes." 431 U. S., at 352. See also *California Brewers Assn.* v. *Bryant*, 444 U. S. 598, 600 (1980). Here, however, the Court of Appeals has premised a Title VII violation on just such a routine application. Surely little is left of *Teamsters* or indeed § 703 (h) if the results of the normal operation of a concededly bona fide seniority system may be used as proof of discrimination. In such a case the employer is found liable not for present racial discrimination but for complying with a seniority system. This is directly contrary to the intent of Congress, embodied in § 703 (h), and the opinion of this Court interpreting that provision in *Teamsters*.

Although statistical evidence of disparate impact in promotions may be a sign of intentional discrimination in some cases, it is not when the statistics are based on the operation of a bona fide seniority system or reflect other nondiscriminatory factors. This has been recognized by other courts employing a more sensitive approach to statistical evidence than that used by the court below. For example, in an opinion remanding a District Court decision for reconsideration in light of *Teamsters*, the Court of Appeals for the Sixth Circuit

[2] In 1966, 0.5% of petitioner's employees at the Dallas plant were black. As of 1977 this figure had risen to 14.7%, surpassing the percentage of blacks in the area's total work force (12.8%). App. to Pet. for Cert. 40a.

recognized that "[w]hile the plantiffs introduced into evidence . . . statistical exhibits . . . that indicated blacks were underrepresented in the better-paying jobs, . . . the statistical differences must be discounted to the extent they are simply a reflection of the impact of the bona fide seniority system . . . ." *Alexander* v. *Aero Lodge No. 735*, 565 F. 2d 1364, 1382 (1977), cert. denied, 436 U. S. 946 (1978). See also *Movement for Opportunity and Equality* v. *General Motors Corp.*, 622 F. 2d 1235, 1244–1245 (CA7 1980).

This Court has recognized that "[s]tatistical analyses have served and will continue to serve an important role as one indirect indicator of racial discrimination . . . ." *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 620 (1974). The blind use of statistics, however, cannot be permitted to undermine the policies of Congress or erode our decisions on substantive law. Disraeli's familiar statement that "there are three kinds of lies: lies, damned lies and statistics," rings true in this case. Because of the growing importance of statistical evidence and the apparent misuse of it below, I would grant certiorari.

No. 80–613. SHOSHONE TRIBE ET AL. *v.* DRY CREEK LODGE, INC., ET AL. C. A. 10th Cir. Motion of Pueblo of Cochiti et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 623 F. 2d 682.

No. 80–5708. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 381 So. 2d 690.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 79–6341. MARTIN *v.* LOUISIANA, *ante*, p. 998;

No. 79–6436. RAY *v.* SOWDERS, REFORMATORY SUPERINTENDENT, 446 U. S. 969;

No. 79–6615. DRAKE *v.* ZANT, WARDEN, *ante*, p. 999;

No. 80–421. FOXMAN ET UX. *v.* RENISON, *ante*, p. 993;

No. 80–5103. DOWNS *v.* FLORIDA, *ante*, p. 976;

No. 80–5172. COLE *v.* STEVENSON, CORRECTIONAL SUPERINTENDENT, ET AL., *ante*, p. 1004;

No. 80–5215. DAMPIER *v.* GEORGIA, *ante*, p. 938; and

No. 80–5264. MONTGOMERY *v.* NATIONAL MULTIPLE SCLEROSIS SOCIETY, *ante*, p. 922. Petitions for rehearing denied.

JANUARY 26, 1981

Appeals Dismissed

No. 80–669. BENSON REALITY CORP. ET AL. *v.* KOCH, MAYOR OF NEW YORK CITY, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 50 N. Y. 2d 994, 409 N. E. 2d 948.

No. 80–897. YOUNG *v.* PARK ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — R. I. —, 417 A. 2d 889.

Certiorari Granted—Vacated and Remanded. (See No. 80–568, *ante*, p. 609.)

Affirmed After Certiorari Granted

No. 78–1577. SEARS, ROEBUCK & CO. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 444 U. S. 823.*] Judgment affirmed by an equally

*[REPORTER'S NOTE: Argued January 15, 1980. *Andrew S. Garb* argued

divided Court. JUSTICE STEWART took no part in the consideration or decision of this case.

Miscellaneous Orders

No. A–600. RHOADES ET AL. *v.* ARKANSAS. Ct. App. Ark. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–601. PARTIDO NUEVO PROGRESISTA ET AL. *v.* PEREZ, ADMINISTRATOR, PUERTO RICO ELECTIONS COMMISSION, ET AL. Application for recall and stay of the mandate of the United States Court of Appeals for the First Circuit, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A–622 (80–1058). HAMPTON ROADS SHIPPING ASSN. ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. C. A. 4th Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–218. IN RE DISBARMENT OF KAUFMAN. It is ordered that Sidney B. Kaufman of Westfield, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

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the cause for petitioner. With him on the briefs were *Frank M. Keesling* and *Thomas W. Henning*.

James Dexter Clark argued the cause for respondents. With him on the brief was *John H. Larson*.

Ernest J. Brown argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Ferguson*, and *Stuart A. Smith*.

Briefs of *amici curiae* urging reversal were filed by *Gerald T. Manpearl* for Pioneer Electronics of America et al.; and by *Charles R. Ajalat*, *pro se*.

This case was restored to the calendar for reargument, 446 U. S. 915, but was not reargued.]

No. 79–1144. TEXAS INDUSTRIES, INC. *v.* RADCLIFF MATERIALS, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 949.] Motion of River Cement Co. for leave to file a brief as *amicus curiae* granted.

No. 79–1711. MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1754. JOINT MEETING OF ESSEX AND UNION COUNTIES *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1760. CITY OF NEW YORK ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.; and

No. 80–12. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 917.] Motion of respondents National Sea Clammers Association and Gosta Lovgren for divided argument denied.

No. 80–120. ST. MARTIN EVANGELICAL LUTHERAN CHURCH ET AL. *v.* SOUTH DAKOTA. Sup. Ct. S. D. [Certiorari granted, *ante*, p. 950.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument granted, and 10 additional minutes allotted for that purpose. Motion of Alabama and Nevada for leave to participate in oral argument as *amici curiae* granted, and 10 additional minutes allotted for that purpose.

No. 80–207. CBS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 80–213. AMERICAN BROADCASTING COS., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 80–214. NATIONAL BROADCASTING CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 950.] Motion of petitioner CBS, Inc., for divided argument granted.

No. 80–5. McCARTY *v.* McCARTY. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction postponed, *ante*, p. 917.] Motion of National Organization for Women Legal Defense and Education Fund et al. for leave to file a brief as *amici curiae* granted.

No. 80–332. RHODES, GOVERNOR OF OHIO, ET AL. *v.* CHAPMAN ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 951.] Motion of American Medical Association et al. for leave to file a brief as *amici curiae* granted.

No. 80–495. LESTER ET UX. *v.* ANDERSON, EXECUTRIX. Ct. App. La., 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–5303. BELTRAN *v.* MYERS, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF HEALTH, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 951.] Motion of petitioner for summary reversal and remand in part, and for vacation and remand in part due to intervening legislation, denied.

No. 80–5981. IN RE WOOD. Petition for writ of habeas corpus denied.

No. 80–5820. IN RE McDONALD;
No. 80–5839. IN RE McCALLUM; and
No. 80–5847. IN RE HUSKEY. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 80–850. JONES, WARDEN *v.* HELMS. Appeal from C. A. 5th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 621 F. 2d 211.

No. 80–901. MARSHALL, SECRETARY OF LABOR *v.* DEWEY ET AL. Appeal from D. C. E. D. Wis. Probable jurisdiction noted. Reported below: 493 F. Supp. 963.

Certiorari Granted

No. 80–710. UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO, ET AL. *v.* LOCAL 334, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 628 F. 2d 812.

No. 80–756. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* GRAY PANTHERS. C. A. D. C. Cir. Certiorari granted. Reported below: 203 U. S. App. D. C. 146, 629 F. 2d 180.

No. 80–802. NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER *v.* BLUE CROSS OF KANSAS CITY ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 628 F. 2d 1050.

No. 80–808. UNITED STATES *v.* TURKETTE. C. A. 1st Cir. Certiorari granted. Reported below: 632 F. 2d 896.

No. 80–5392. HOWE *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 625 F. 2d 454.

Certiorari Denied. (See also No. 80–897, *supra.*)

No. 79–1426. BANKERS TRUST CO. *v.* MALLIS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 615 F. 2d 68.

No. 79–5515. BROWN *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 835.

No. 80–146. SHIFFRIN ET AL. *v.* BRATTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 635 F. 2d 1228.

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No. 80–542. SCHNEIDER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 269 Ark. 245, 599 S. W. 2d 730.

No. 80–580. O'HARA ET AL., GUARDIANS *v.* KOVENS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 625 F. 2d 15.

No. 80–584. WALSH, ADMINISTRATRIX *v.* LOUISIANA HIGH SCHOOL ATHLETIC ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 152.

No. 80–586. CHEVRON SHIPPING CO. (STANDARD OIL COMPANY OF CALIFORNIA) *v.* BAPTISTE. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 106 Cal. App. 3d 87, 164 Cal. Rptr. 789.

No. 80–596. O'DONNELL *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 378 So. 2d 1311.

No. 80–624. HUFSTEDLER, SECRETARY OF EDUCATION, ET AL. *v.* BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 599.

No. 80–667. WITTENBERG ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 813.

No. 80–685. THRIF-TEE, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1351.

No. 80–709. BADWAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1228.

No. 80–720. ASSURE COMPETITIVE TRANSPORTATION, INC. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 629 F. 2d 467.

No. 80–726. IN RE YENGO. Sup. Ct. N. J. Certiorari denied. Reported below: 84 N. J. 111, 417 A. 2d 533.

No. 80–735. BELLINGHAM FROZEN FOODS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 674.

No. 80–821. JOHNSTON ET AL. *v.* SILVA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 640.

No. 80–831. BRONNER *v.* FULTON ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 388 So. 2d 533.

No. 80–834. HIGHLANDERS, INC., ET AL. *v.* ROTHMAN, TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 80–836. SIMMONS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 390, 271 S. E. 2d 468.

No. 80–838. EVANS ET AL. *v.* CENTRAL PIEDMONT COMMUNITY COLLEGE. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 860.

No. 80–842. KELLY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cx.

No. 80–849. JEFFERSON TRUCKING CO., INC. *v.* CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS, LOCAL UNION No. 135. C. A. 7th Cir. Certiorari denied. Reported below: 628 F. 2d 1023.

No. 80–857. MCQUEENEY *v.* GLENN ET AL. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 400 N. E. 2d 806.

No. 80–861. BAGNALL ET AL. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL, ET AL.; and

No. 80–886. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* BAGNALL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 336.

No. 80–896. AVNET *v.* AVNET Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 751.

No. 80–908. VILLAGE OF HOFFMAN ESTATES *v.* VILLAGE OF BARRINGTON HILLS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 81 Ill. 2d 392, 410 N. E. 2d 37.

No. 80–5445. MARSHALL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5452. LACY *v.* LOCAL 287, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–5467. CORNELL *v.* IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 628 F. 2d 1044.

No. 80–5468. GENTRY *v.* UTAH. Sup. Ct. Utah. Certiorari denied.

No. 80–5472. COLLINS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 80–5490. FLEMISTER *v.* JOHNSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1090.

No. 80–5525. MAZUS *v.* DEPARTMENT OF TRANSPORTATION OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 629 F. 2d 870.

No. 80–5548. GALVEZ-DIAZ *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 191.

No. 80–5573. CUTHBERTSON ET AL. *v.* CBS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 139.

No. 80–5578. PEISTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 631 F. 2d 658.

No. 80–5581. STEELE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 628.

No. 80–5586. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 80–5600. FARBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 630 F. 2d 569.

No. 80–5608. SANDERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 631 F. 2d 1309.

No. 80–5613. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 830.

No. 80–5615. FARMER *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5638. ANYAMELE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 171.

No. 80–5707. POARCH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. cxxix.

No. 80–5764. POPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 217.

No. 80–5779. CIRAOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–5783. WATKINS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5785. WOOD *v.* WAINWRIGHT. C. A. 5th Cir. Certiorari denied.

No. 80–5787. WILSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 80–5789. SCHLEMM *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 82 Ill. App. 3d 639, 402 N. E. 2d 810.

No. 80–5794. MEIER *v.* PEARLMAN ET AL. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 401 N. E. 2d 31.

No. 80–5808. OLIVER *v.* MARKS, CORRECTIONS COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5809. BONDS-EL *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 213.

No. 80–5819. MCCRARY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–5830. DUNK ET UX. *v.* MANUFACTURERS LIGHT & HEAT CO. Sup. Ct. Pa. Certiorari denied.

No. 80–5841. SHAFFNER *v.* SOWDERS, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1219.

No. 80–5870. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 994 and 622 F. 2d 917.

No. 80–5876. ALEXANDER *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5893. HARRISON *v.* LEFEVRE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 80–5906. YIN-HO WONG *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 628.

No. 80–5907. VANDER PAUWERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 223.

No. 80–5927. HAMPTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 633 F. 2d 927.

No. 80–5928. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 634 F. 2d 637.

No. 80–5929. SANDOVAL-CASTANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1205.

No. 80–5931. FLOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 633 F. 2d 222.

No. 80–5940. WALTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 629 F. 2d 1347.

No. 80–5943. WILLIS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 633 F. 2d 930.

No. 80–5946. GOODMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 639 F. 2d 770.

No. 80–5947. ALI *v.* GIBSON, COMMISSIONER OF PUBLIC SAFETY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 631 F. 2d 1126.

No. 80–270. PAXMAN ET AL. *v.* HENRICO COUNTY SCHOOL BOARD ET AL.;

No. 80–451. ALBEMARLE COUNTY SCHOOL BOARD *v.* PAXMAN; and

No. 80–452. HENRICO COUNTY SCHOOL BOARD *v.* PAXMAN ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 612 F. 2d 848.

No. 80–341. WERNETH *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 101 Idaho 241, 611 P. 2d 1026.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner seeks review on double jeopardy grounds of his conviction of embezzlement by corporate officer. I would grant the petition for certiorari and reverse the judgment of the Supreme Court of Idaho.

Petitioner was initially charged with the crime of embezzle-

ment by bailee. Idaho Code § 18–2407 (1979). At the start of the trial a jury was empaneled, witnesses were sworn, and testimony by a state witness was taken. 101 Idaho 241, 242, 611 P. 2d 1026, 1027 (1980). Jeopardy had clearly attached. *Crist* v. *Bretz*, 437 U. S. 28, 38 (1978).

The State then moved to amend the information to charge the additional crime of embezzlement by corporate officer. Idaho Code § 18–2402 (1948). Defense counsel opposed the motion and the trial judge sustained the objection. The State then moved to dismiss the original charge, embezzlement by bailee, and after defense counsel stated and then withdrew his objection, the trial judge dismissed that charge.

Four days later, petitioner was charged with the crime of embezzlement by corporate officer. The charge was based on the same transaction which had given rise to the dismissed charge. Petitioner moved to dismiss on the ground that a new trial would violate his right against double jeopardy, but that motion was denied and petitioner was convicted. Petitioner then appealed to the Idaho Supreme Court, which affirmed the conviction. The Idaho Supreme Court did, however, reject the trial court's finding that petitioner had consented to dismissal of the initial charge of embezzlement by bailee.

I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Clift* v. *Alabama*, 435 U. S. 909 (1978) (BRENNAN, J., dissenting); *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein. Accordingly, I would grant the petition for certiorari and reverse the judgment of the Supreme Court of Idaho.

No. 80–384. MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE *v.* UNGER. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 102 Cal. App. 3d 681, 162 Cal. Rptr. 611.

No. 80–571. MISSOURI *v.* SOURS. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BLACKMUN and JUSTICE REHNQUIST would dismiss the petition for writ of certiorari as moot. Reported below: 603 S. W. 2d 592.

No. 80–639. SULLIVAN *v.* PERINI NORTH RIVER ASSOCIATES ET AL.; and

No. 80–651. FUSCO *v.* PERINI NORTH RIVER ASSOCIATES ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 622 F. 2d 1111.

No. 80–649. EDISON ELECTRIC INSTITUTE ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 80–675. MOORE ET AL. *v.* PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF NEW JERSEY ET AL. Sup. Ct. N. J. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 83 N. J. 572, 417 A. 2d 19.

No. 80–887. BURNS ET AL. *v.* DIOCESE OF NEWARK ET AL. Sup. Ct. N. J. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 83 N. J. 594, 417 A. 2d 31.

No. 80–830. ADVERTISER CO. *v.* FULTON ET AL. Sup. Ct. Ala. Motion of South Carolina Press Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 388 So. 2d 533.

No. 80–869. HOTT *v.* INDIANA. Ct. App. Ind. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: —— Ind. App. ——, 400 N. E. 2d 206.

No. 80–878. OLKON *v.* MINNESOTA. Sup. Ct. Minn. Motion of Minnesota Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 299 N. W. 2d 89.

No. 80–5161. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 611 P. 2d 1137.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner was charged by information on April 1, 1975, in the District Court of Tulsa County, Okla., with the crime of kidnaping for the purpose of extortion. On April 16, 1975, he was charged in the District Court of Osage County, Okla., with the crime of murder in the first degree arising out of the same criminal episode. Following preliminary hearings in both courts, petitioner was bound over for trial. He subsequently moved for and was granted a continuance of the murder trial pending completion of his kidnaping trial.

Petitioner was found guilty of kidnaping and sentenced to 60 years in prison. Petitioner then filed a pleading in the Osage County District Court, entitled "Petition for Writ of Habeas Corpus or Petition for Writ of Prohibition or Petition for Writ of Mandamus," alleging, *inter alia*, that a trial on the first-degree murder charge would violate his federal constitutional right against multiple trials and multiple punishments embodied in the Double Jeopardy Clause of the Fifth Amendment. Before the District Court acted on his pleading, petitioner sought similar relief from the Oklahoma Court of Criminal Appeals, which was denied. The District Court later denied the requested relief.

Petitioner next filed in Osage County District Court a "Plea

of Former Jeopardy," urging that his kidnaping conviction barred the murder trial on the ground that the two crimes were not separate and distinct offenses. He also moved to strike all references to the kidnaping in the Osage County information. Although the plea and the motion were denied by the District Court, the Court of Criminal Appeals, upon application by petitioner for a writ of mandamus, vacated the trial court's ruling, holding that the plea and motion should have been granted. The court noted, however, that the kidnaping conviction would not prohibit a subsequent prosecution for second-degree murder. Contending that a second-degree murder trial was also barred, petitioner sought a rehearing and a writ of prohibition. The Court of Criminal Appeals, after vacating its previous opinion prohibiting a trial on first-degree murder but allowing a trial on second-degree murder, denied all of petitioner's requests for relief. *Johnson* v. *Hampton*, 572 P. 2d 1301 (1978).

On petition for certiorari, this Court granted certiorari, vacated the Court of Criminal Appeals decision, and remanded the case for further consideration in light of *Brown* v. *Ohio*, 432 U. S. 161 (1977), and *Harris* v. *Oklahoma*, 433 U. S. 682 (1977). *Johnson* v. *Hampton*, 434 U. S. 947 (1977). On remand, the Court of Criminal Appeals granted a writ of prohibition against a trial for first-degree murder. The information was subsequently amended to charge second-degree murder, and to strike all references to the kidnaping. Petitioner again sought a writ of prohibition from the Court of Criminal Appeals, alleging, *inter alia*, that the trial would violate the Double Jeopardy Clause. The court declined to assume jurisdiction and dismissed the writ. Petitioner then was tried and convicted of second-degree murder, and sentenced to 10 years to life. On appeal, the Court of Criminal Appeals affirmed. 611 P. 2d 1137 (1980).

I would grant the petition for certiorari and reverse the judgment of the Oklahoma Court of Criminal Appeals. I

adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, applied to the States through the Fourteenth Amendment, requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.*

No. 80–5514. SEAY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 390 So. 2d 11.

No. 80–5823. DILDINE *v.* DILDINE ET AL. Sup. Ct. S. C. Certiorari denied. JUSTICE MARSHALL would grant certiorari.

No. 80–5854. CAPE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 520, 272 S. E. 2d 487.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 80–320. COSTELLO *v.* BOARD OF APPEALS OF THE TOWN OF CONCORD, *ante*, p. 1011;

No. 80–391. AKERS *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 993;

No. 80–555. COTA *v.* COUNTY OF LOS ANGELES ET AL., *ante*, p. 1014; and

No. 80–5493. LEVASSEUR *v.* HAWAII, *ante*, p. 1018. Petitions for rehearing denied.

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*Respondent argues that petitioner waived his double jeopardy claim in the proceedings below. Respondent's arguments are meritless.

No. 80–5537. JONES *v.* CIVILETTI, ATTORNEY GENERAL, ET AL., *ante*, p. 1019;

No. 80–5539. GRINAN *v.* GIEGOLD, *ante*, p. 1019; and

No. 80–5561. HANCE *v.* GEORGIA, *ante*, p. 1067. Petitions for rehearing denied.

No. 79–6542. O'HERN *v.* CHICAGO TYPOGRAPHICAL UNION No. 16 ET AL., *ante*, p. 849. Motion for leave to file petition for rehearing denied.

FEBRUARY 10, 1981

Dismissal Under Rule 53

No. 79–1587. A/S IVARANS REDERI *v.* JOHNSON. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 613 F. 2d 334.

AMENDMENTS OF RULES OF THIS COURT

ORDER

It is ordered that Rule 28.1 of the Rules of the Supreme Court of the United States be amended to read as follows:

"28.1. Pleadings, motions, notices, briefs, or other documents or papers required or permitted to be presented to this Court or to a Justice shall be filed with the Clerk. Any document filed by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance. Any document, except a joint appendix or a brief *amicus curiae*, filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation. This listing may be done in a footnote. If such listing has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only amendments to the listing to make it currently accurate need be included in the document currently being filed."

It is further ordered that Rules 9.3, 9.6, 15.1 (b), 16.2, 21.1 (b), 22.2, 25.4, 34.1 (b), 34.2 and 43.2 be amended by adding at the end of each such Rule the following:

"See Rule 28.1."

The foregoing amendments shall become effective on November 21, 1980.

OCTOBER 21, 1980

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1137 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

O'CONNOR, BY HER PARENTS AND NEXT FRIENDS, O'CONNOR ET UX. *v.* BOARD OF EDUCATION OF SCHOOL DISTRICT 23 ET AL.

ON APPLICATION TO VACATE STAY

No. A-384. Decided November 4, 1980

An application to vacate the Court of Appeals' stay pending appeal of the District Court's preliminary injunction requiring respondent school officials to allow plaintiff-applicant, a female junior high school student, to try out for the boys' basketball teams, is denied. As required by an interscholastic athletic conference's rules, the school maintained separate teams for boys and girls for contact sports, including basketball, and the refusal to allow applicant to try out for the boys' teams was based solely on her sex. The Court of Appeals' en banc decision to continue the stay entered by a panel of the court is entitled to great deference. It appears at this stage of the proceedings that the gender-based classification, which apparently was adopted in full compliance with the regulations of the Department of Health, Education, and Welfare, is reasonable in substantially all of its applications, and it cannot be said to be unconstitutional simply because it might appear arbitrary in an individual case such as applicant's. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events.

JUSTICE STEVENS, Circuit Justice.

On October 27, 1980, a panel of the United States Court of Appeals for the Seventh Circuit granted a stay pending appeal of a preliminary injunction entered by the District Court in favor of the plaintiff. Two days later, the Court of Appeals sitting en banc entered an order continuing the stay. The plaintiff has submitted to me, in my capacity as Circuit Justice, an application to vacate this stay. For the

reasons explained below, I have decided not to vacate the stay entered by the Court of Appeals.

I

On October 22, 1980, plaintiff Karen O'Connor, represented by her father and her mother, filed a verified complaint and a motion for a temporary restraining order and preliminary injunction, supported by appropriate affidavits, in the United States District Court for the Northern District of Illinois. Her papers allege the following facts which, since they have not yet been denied or contradicted by countervailing affidavits or evidence, must be accepted as true.

Karen is an 11-year-old sixth-grade student at MacArthur Junior High School; she is 4'11" tall and weighs 103 pounds. For at least four years she has successfully competed with boys in various organized basketball programs. A professional basketball coach who witnessed her play with boys and girls aged 10 to 13 during the summer of 1980 rates her ability as equal to or better than a female high school sophomore player and equal to that of a male eighth-grade player.

MacArthur Junior High School is a member of the Mid-Suburban Junior High School Conference, an association of six junior high schools engaged in interscholastic athletics. MacArthur has programs for seventh-grade and for eighth-grade teams; sixth-grade students are eligible to try out for both the seventh-grade and the eighth-grade teams. Students of either sex may compete on the same teams in some noncontact sports, but Conference rules require separate teams for boys and girls for contact sports. Contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact." See Complaint ¶ 35.

On August 27, 1980, Karen's father requested that she be permitted to try out for the boys' basketball teams. After a series of requests and refusals, Karen and her parents com-

menced this litigation, seeking both a temporary order requiring defendants to allow her to participate in the tryouts which were originally scheduled to commence on October 27, 1980, and permanent relief allowing her to play in interscholastic competition if she made either the seventh-grade or the eighth-grade team.

After an adversary hearing, on October 23, 1980, the District Court rendered an oral opinion and granted temporary relief to the plaintiff. The court held that the plaintiff had established a likelihood of success on the merits and that she would suffer irreparable injury if temporary relief was denied. The court concluded that she had a constitutionally protected interest in equal access to training and competition that would develop her athletic talents. The court rejected the two justifications presented by the defendants at the hearing.

First, without deciding whether the provision of separate but equal facilities to male and female students would avoid any constitutional objection, the District Court found that the separate programs offered by the defendants were not in fact equal because Karen's opportunity to compete with persons of substantially lesser skill in the girls' program was not as valuable as the opportunity to compete with those who are equal or superior to her in ability in the boys' program.

Second, the defendants argued that if they allowed Karen to try out for the boys' teams, they would have to allow boys to try out for the girls' teams, and since boys generally have superior athletic ability, the boys would dominate the girls' programs and ultimately deprive girls of a fair opportunity to engage in competitive athletics. The District Court rejected this argument, stating merely that the defendants had not persuaded it that there were no less restrictive alternatives available, other than completely separate programs classified entirely on the basis of sex.

The District Court refused to grant a stay pending appeal. As I understand the facts, defendants thereafter (1) post-

poned the tryouts;[1] (2) filed an appeal from the preliminary injunction requiring them to allow Karen to try out for the boys' teams; and (3) applied to the Court of Appeals for a stay of the District Court's injunction. On October 27, by a vote of 2 to 1, a three-judge panel granted a stay, without opinion. On October 29, 1980, the Court of Appeals, sitting en banc, voted 5 to 3 to continue the stay pending the appeal. On October 31, 1980, the plaintiff filed her petition to vacate the stay entered by the Court of Appeals, supported by various papers filed in the District Court and the Court of Appeals. Defendants filed their response on November 3, 1980.

II

Although I have the power, acting as Circuit Justice, to dissolve the stay entered by the Court of Appeals, *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers), this power is to be exercised "with the greatest of caution and should be reserved for exceptional circumstances." *Ibid.* A Court of Appeals' decision to enter a stay is entitled to great deference, *Commodity Futures Trading Comm'n* v. *British American Commodity Options Corp.*, 434 U. S. 1316, 1319 (1977) (MARSHALL, J., in chambers); such deference is especially appropriate when the Court of Appeals has acted en banc. Nevertheless, the question presented by the application is sufficiently difficult to justify careful consideration.[2] In answering that question, I shall first identify certain propositions that seem to be adequately established.

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[1] The papers filed on behalf of Karen in this Court suggest that the defendants rescheduled the tryouts in order to deprive Karen of the opportunity to try out for the boys' teams while the defendants sought a stay from the Court of Appeals. The defendants assert that the rescheduling was required because of the postponement, due to inclement weather, of another athletic event. Because the motive underlying the rescheduling is not relevant to the question presented here, resolution of this factual conflict is unnecessary.

[2] The difficulty of the question presented by the defendants' request for

First, there is no dispute about the fact that the defendants have acted under color of state law and that their refusal to allow Karen to try out for the boys' teams is based solely on the fact that she is a girl. Whether or not Karen's interest in improving her athletic skills is characterized as "fundamental" or something less, I think it is clear that the defendants have the burden of justifying a discrimination of this kind.

Second, since the burden of justification was on the defendants, at this stage of the proceeding the stay entered by the Court of Appeals cannot be upheld on grounds not yet supported by the record, even though it may remain open to the defendants to offer additional evidence at a full trial. Thus, for example, the defendants have preserved the right to offer evidence to support the proposition that the exclusion of girls from the boys' teams is necessary to protect female athletes from harm. They were unable to present evidence supporting such a justification at the preliminary hearing, however, and therefore this justification is not available to them at this stage of this proceeding. Defendants have also made no claim that the *boys'* athletic program would be harmed in any way by allowing Karen to participate.[3] Nor have they suggested

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a stay is illustrated by the fact that Judge Cudahy, a member of the majority of the panel which granted the stay on October 27, dissented from the Court of Appeals' en banc decision to continue the stay on October 29.

[3] In their response filed in this Court, the defendants have suggested that the girls' basketball program will be injured if Karen is allowed to participate in the boys' program, because the girls' program will then be deprived of its best athlete. This justification, like the need to protect female athletes from physical or psychological harm, while plausible, is not supported by the present record. It cannot, therefore, be used as a basis for upholding the stay entered by the Court of Appeals. The fact that defendants advance this argument indicates that they regard Karen as still eligible to participate in the girls' program even though she declined to participate in the girls' tryouts while this matter has been pending.

that the exclusion of Karen is necessary in order to protect Karen from harm.

Third, although the record is incomplete, plaintiff does not appear to dispute defendants' representation that the separate athletic programs for the girls are equal to the boys' programs in the sense that the time, money, personnel, and facilities devoted to each are equal. Defendants are therefore correct in putting to one side the cases in which a number of courts have ordered schools to allow girls to participate on boys' teams following a showing that the girls' programs were inferior.

Fourth, in deciding whether to vacate the stay, I have a duty to consider the potential of irreparable harm to the respective parties. Although defendants have argued to the contrary, I am persuaded that the District Court was correct in concluding that, if Karen will probably succeed on the merits, she would suffer greater harm than would the defendants by allowing her to try out for the boys' teams. I am therefore persuaded that the stay can only be supported by the sufficiency of the defendants' showing that there is an adequate reason for discriminating against Karen because of her sex.

In my opinion, the question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer Karen opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility. If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.[4]

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[4] I share District Judge Marshall's view that if attention is confined to the application of the rule to Karen—rather than to the general

It seems to me that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events. The defendants' program appears to have been adopted in full compliance with the regulations promulgated by the Department of Health, Education, and Welfare.[5] Although such compliance certainly does not confer immunity on the defendants,

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validity of the rule—the discrimination does appear arbitrary. In some respects, Karen's claim is no different from that of any other sixth or seventh grader. The younger children are permitted to try out for the eighth-grade teams, but the eighth graders are excluded from the seventh-grade teams because their participation would be unfair to the younger students. The fact that an eighth grader must face competition from talented seventh graders without reciprocal rights indicates that there is no necessary reason why boys may not be required to compete with talented girls without reciprocal rights. I would also note that Karen's claim is supported by the Court's equal protection analysis in *Caban* v. *Mohammed*, 441 U. S. 380, 391–394 (1979); see *id.*, at 409–412 (STEVENS, J., dissenting).

[5] The Department of Health, Education, and Welfare, pursuant to Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681, promulgated regulations designed to eliminate discrimination on the basis of sex in education programs and activities receiving federal financial assistance. One of these regulations, specifically addressing gender-based discrimination in athletic programs, provides in part:

"[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact." 45 CFR § 86.41 (b) (1979).

it does indicate a strong probability that the gender-based classification can be adequately justified. At least that probability is sufficient to persuade me that I should adhere to the practice of according deference to the judgment of the majority of my colleagues on the Court of Appeals.

The application to vacate the stay is denied.

McCARTHY, SUPERINTENDENT *v.* HARPER

ON APPLICATION FOR STAY

No. A-631. Decided February 3, 1981

An application for a stay, pending applicant's petition for certiorari, of the mandate of the Court of Appeals—which had reversed the District Court's judgment dismissing respondent state prisoner's habeas corpus petition—is granted. Title 28 U. S. C. § 2253 provides that an appeal may not be taken to a court of appeals from a final order in a habeas corpus proceeding based on detention arising from state-court process unless the judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. There is no indication that such a certificate was issued here, and at least four other Members of this Court would probably share the view that, accordingly, the Court of Appeals was prohibited by statute from entertaining respondent's appeal from the District Court's judgment. Thus, this Court would probably grant certiorari and reverse the Court of Appeals' judgment with instructions to dismiss respondent's appeal.

JUSTICE REHNQUIST, Circuit Justice.

Applicant McCarthy has requested me to stay the issuance of the mandate of the Court of Appeals for the Ninth Circuit in this case pending his petition for certiorari on the grounds that the Court of Appeals failed to require respondent to exhaust all of his state remedies before seeking federal habeas to challenge his conviction. The Court of Appeals reversed a judgment of the United States District Court for the Central District of California dismissing respondent's petition for habeas corpus, and in doing so it relied on its own earlier decision in *Harris* v. *Superior Court*, 500 F. 2d 1124 (1974) (en banc), cert. denied, 420 U. S. 973 (1975). *Harris* in turn held that a "postcard" denial of a petition for writ of habeas corpus by the California Supreme Court, without opinion or citation, constitutes a denial on the merits and therefore satisfies the exhaustion requirement.

Because I felt there was a threshold jurisdictional problem

which had not been addressed by the Court of Appeals or by the applicant, I called for a response from the respondent. This document, consisting of 16 lines of text, quite candidly states that "respondent must tell the court that according to the records of the California Bureau of Prisons, Theodore Monroe Harper is no longer in prison or on parole. Respondent's counsel did not learn this until a few days ago, when a status letter to Mr. Harper and copies of pleadings which he had sent to his client were returned without a forwarding address. Respondent's counsel now is unable to locate his client. As a result of this situation, it is respondent's belief that this case may be moot and no case or controversy may be present." Response to Application 1.

Federal habeas corpus is a civil action, and this Court has jurisdiction to consider applicant's petition for certiorari to the Court of Appeals for the Ninth Circuit only if the case was properly appealed from the District Court to the Court of Appeals. Title 28 U. S. C. § 2253 provides in pertinent part:

> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

The District Court in this case, in a judgment rendered pursuant to Federal Rule of Civil Procedure 58, stated that "It is adjudged that the Petition for Writ of Habeas Corpus is dismissed." There is no indication that either the judge of the District Court or a circuit justice or judge has issued a certificate of probable cause in this case. As presently advised I am therefore of the opinion, which I believe would be shared by at least four of my colleagues, that the Court of Appeals was prohibited by statute from entertaining respondent's appeal from the order of the District Court dismissing

his application for a writ of habeas corpus. "Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists." *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U. S. 737, 740 (1976). That leads me to the further conclusion that this Court would grant applicant's petition for certiorari, and, unless it chose to ignore the above quoted provision of 28 U. S. C. § 2253, reverse the judgment of the Court of Appeals with instructions to dismiss respondent's appeal from the order of the District Court.

If I am correct in my reasoning, the mandate of the Court of Appeals for the Ninth Circuit should be stayed pending applicant's petition for certiorari to this Court. Because of the jurisdictional defect in the appeal, I find it unnecessary to reach applicant's contentions respecting the correctness of the decision of the Court of Appeals for the Ninth Circuit in *Harris* v. *Superior Court, supra.*

A stay has been entered pending the timely filing of a petition for writ of certiorari by applicant, with the usual terms as to its duration.

It is so ordered.

338-282 O - 82 - 74 : QL 3

ATIYEH, GOVERNOR OF OREGON, ET AL. *v.* CAPPS ET AL.

ON APPLICATION FOR STAY

No. A-625. Decided February 4, 1981

An application to stay the District Court's injunction, which requires Oregon officials to eliminate "overcrowding" in a certain prison by reducing the number of prisoners housed there by specified amounts by specified dates, is granted pending either the Court of Appeals' decision in the appeal in this case or this Court's decision in *Rhodes* v. *Chapman*, No. 80-332, scheduled for argument this Term and involving similar issues (whichever may come first). It appears that the District Court, in determining the appropriate standards under the Eighth and Fourteenth Amendments to be applied in considering conditions of imprisonment, misconstrued pertinent decisions of this Court. Moreover, the District Court's order f ils to comply with the specificity requirement of Federal Rule of Civil Procedure 65 (d).

JUSTICE REHNQUIST, Circuit Justice.

This matter has previously come before me on the application of applicant Atiyeh, Governor of Oregon, applicant Watson, administrator of the Corrections Division of the State of Oregon, and applicant Cupp, Superintendent of the Oregon State Penitentiary, on a motion for a stay of the final injunction issued by the United States District Court for the District of Oregon pending appeal to the Court of Appeals for the Ninth Circuit. I issued a temporary stay, feeling that on the basis of the application there was merit to some of the applicants' points, but not wanting to proceed further with even my own analysis without calling for a response. I called for that response, and it has now been received.

The tests have been stated and restated as to probability of success on the merits, the probability of four Justices voting to grant certiorari, and the like as guideposts for the exercise of the function of the Circuit Justice in granting or denying stays. Because this is not an appeal from an adverse

ruling of the Court of Appeals for the Ninth Circuit, from which a similar stay was sought and denied, it is not in a posture where the so-called "stay equities" can be readily evaluated, but I am satisfied in my own mind that, although it should not be nearly as frequently done as in the case of a final judgment of the court of appeals, an application to a Circuit Justice of this Court from a district court is within the contemplation of the All Writs Act, 28 U. S. C. § 1651 (a). I do not understand the respondents to contest this proposition as a matter of law. I recognize that they are correct in their statement in their response that "[t]he normal presumption is that '[i]n all cases, the fact weighs heavily that the lower court refused to stay its order pending appeal.'" Memorandum for Respondents 2. And, because an appeal from the District Court order is presently pending before the Court of Appeals for the Ninth Circuit, the rule to be followed is that "[o]rdinarily a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted . . . ." *Pasadena Board of Education* v. *Spangler*, 423 U. S. 1335, 1336 (1975) (REHNQUIST, J., in chambers).

Having given such time as was possible to the consideration of the lengthy and able submissions on the part of both parties, I have decided to grant the stay pending the decision of this Court in *Rhodes* v. *Chapman*, No. 80–332, presently scheduled for argument this Term, or the decision of the Court of Appeals for the Ninth Circuit pursuant to its expedited briefing schedule (whichever may come first). My reasons for doing so follow and they rest both on procedural and substantive grounds.

I find in the carefully considered opinion, findings of fact, and conclusions of law of the District Court a set of assumptions which I do not believe the Constitution warrants, and I believe that at least three other Justices of this Court would concur in my belief. The court dealt with a "maximum security prison" located in Salem, Ore., comprising 22 acres surrounded by a re-enforced concrete wall averaging

25 feet in height. Prisoners are housed in five units. One of these cellblocks was built in 1929, two in the early 1950's, and the newest in 1964. 495 F. Supp. 802, 808 (1980). The findings of fact and conclusions of law proceed to set forth in great detail the numbers, facilities, and conditions at this prison. Some of those findings and conclusions were based on the Standards of the American Correctional Association, *id.*, at 809, the National Sheriffs' Association Standards, *id.*, at 810, and the Standards of the United States Army. *Ibid.*

The District Court also relied on the testimony of a professor of psychology at the University of Texas at Arlington to the effect that the housing at the Salem institution is "inadequate to avoid adverse physical and mental effects." *Ibid.* It also relied on the testimony of the Dean of the University of Chicago Law School that the "overcrowding" levels that exist at the institution undermine the initiative of inmates to seek self-improvement and prevent their rehabilitation. *Id.*, at 811.

Naturally, penal officials would like to have a larger share of the State's budget, just as would any number of other state officials administering programs mandated by the State. But there is nothing in the Constitution that says that "rehabilitation" is the sole permissible goal of incarceration, and we have only recently stated that retribution is equally permissible. See *Gregg* v. *Georgia*, 428 U. S. 153, 184, n. 30 (1976).

The District Court concluded by stating that overcrowding "exceeds the level of applicable professional standards; has increased the health risks to which inmates are exposed; has impinged on the proper delivery of medical and mental health care; has reduced the opportunity for inmates to participate in rehabilitative programs; has resulted in idleness; has produced an atmosphere of tension and fear among inmates and staff; has reduced the ability of the institutions to protect the inmates from assaults; and is likely to produce embit-

tered citizens with heightened antisocial attitudes and behavior." 495 F. Supp., at 813.

I think the District Court, while it may be correct in its findings of fact, and is certainly closer to the scene than a single Circuit Justice in Washington, has missed the point of several of our cases, including *Price* v. *Johnston*, 334 U. S. 266 (1948), *Procunier* v. *Martinez*, 416 U. S. 396 (1974), and *Bell* v. *Wolfish*, 441 U. S. 520 (1979). It has chosen to rely on a plurality opinion in *Trop* v. *Dulles*, 356 U. S. 86 (1958), stating in dicta that the touchstone of the Eighth Amendment is "nothing less than the dignity of man." *Id.*, at 100.

I find the District Court's efforts to distinguish *Bell* v. *Wolfish*, *supra*, particularly unpersuasive, although I likewise realize that there is considerable difference of opinion among the Members of this Court as to the merits of that decision. The District Court states that *Bell* "is not controlling here" because double-celling of pretrial detainees for no more than 60 days is quite different from institutions housing people who have been convicted of crime and are sentenced to long-term confinement. But this cuts both ways: a pretrial detainee, presumably detained on probable cause but not yet having been found guilty as charged under our constitutional procedures, cannot be "punished" at all. See *Bell* v. *Wolfish*, *supra*. The respondents here, however, each of whom *has* been tried, found guilty, and sentenced to a term which turns out to be, in terms of "mean time served," 24 months, 495 F. Supp., at 814, are in a different boat from both their perspective and society's perspective. So far as they are concerned, they will have to endure the overcrowded conditions for a longer period of time than the pretrial detainees had to endure them in *Bell* v. *Wolfish*, *supra;* but from the point of view of society, the legislature has spoken through its penal statutes and its conferring of authority on the parole authorities to seriously penalize those duly convicted of crimes which it has defined as such. In short, nobody promised

them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like. They have been convicted of crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.

It is equally well settled that prisoners have constitutional rights, and that *cadena temporal*, see *Weems* v. *United States*, 217 U. S. 349, 382 (1910), and conditions such as those described in the Arkansas prison system in *Hutto* v. *Finney*, 437 U. S. 678 (1978), exceed the bounds permitted the States by the Eighth and Fourteenth Amendments to the United States Constitution. It is considerations such as these with which this Court must deal in its upcoming decision and opinion in *Rhodes* v. *Chapman*, *supra*, a case relied upon by the District Court in its findings and conclusions when it was simply a decision of the Court of Appeals for the Sixth Circuit. I think it best, in the exercise of my function as Circuit Justice, that the District Court have the benefit of this Court's opinion in that case before it takes over the management of the Oregon prison system.

The actual order entered by the District Court reads as follows:

> "[T]he court will require that a reduction of the total population at the three facilities by 500 persons be accomplished by December 31, 1980, together with a further reduction of at least 250 by March 31, 1981. The order will not direct the state to adopt any particular methods to achieve this goal. However, to assure that progress toward that goal is being made, defendants will be ordered to report monthly, commencing on September 1, 1980, on the number of persons housed at each

facility and the steps that have been taken and remain to be taken to meet the deadlines imposed." 495 F. Supp., at 806.

In my opinion, the above order of the District Court fails to comply with Federal Rule of Civil Procedure 65 (d), which provides in relevant part:

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."

Several years ago we stated in *Schmidt* v. *Lessard*, 414 U. S. 473 (1974):

"As we have emphasized in the past, the specificity provisions of Rule 65 (d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood . . . .

"The requirement of specificity in injunction orders performs a second important function. Unless the trial court carefully frames its orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing. *Gunn* [v. *University Committee to End the War*, 399 U. S.] 383, [388 (1970)]. We can hardly begin to assess the correctness of the judgment entered by the District Court here without knowing its precise bounds. In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible." *Id.*, at 476–477.

The language in the order of the District Court directing the prison officials to accomplish a further reduction of "at least 250" by March 31, 1981, falls short of this specificity requirement.

For all of the above-stated reasons, and because in the normal course of events by the close of this Court's October 1980 Term a decision should be handed down in *Rhodes* v. *Chapman, supra,* I think that the District Court's ultimate resolution of the case before it will be facilitated, not retarded, by the issuance of a stay as previously indicated. There is no reason for courts to become the allies of prison officials in seeking to avoid unpleasant prison conditions when the executive and the legislature of the State have decided that only a certain amount of money shall be allocated to prison facilities; there is likewise no reason for the District Court to stay its hand when specific constitutional violations are called to its attention.

It is accordingly ordered that the injunction issued by the District Court be stayed, pending either the decision of the Court of Appeals for the Ninth Circuit in this case or the decision of this Court in *Rhodes* v. *Chapman, supra,* whichever may come first.

CALIFORNIA *v.* RIEGLER

ON APPLICATION FOR STAY

No. A-659. Decided February 5, 1981

An application to stay, pending the filing of a petition for certiorari, the California Court of Appeal's judgment reversing respondent's state drug conviction on the ground that the Fourth Amendment was violated, is granted. After a lawful customs search revealed hashish in packages mailed from Germany, law enforcement officials arranged for a controlled delivery of the packages; obtained a warrant to search the place of delivery and seize the packages; delayed executing the warrant and followed respondent and others when they left the delivery place by automobile with the packages; and, after arresting the suspects, reopened the packages at the police station without obtaining a second search warrant. The stay is warranted because the state court's decision was based on the Federal Constitution; the "balance of equities" favors the State, which must either retry or dismiss the case, whereas respondent has been free on bail since conviction; and the case presents issues of sufficient importance that four Justices of this Court probably will vote to grant certiorari.

JUSTICE REHNQUIST, Circuit Justice.

The applicant, the State of California, has asked me to stay the execution and enforcement of the judgment of the California Court of Appeal in *People* v. *Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980), pending the filing of a petition for writ of certiorari and a final determination of the case by this Court. Review is sought of the Court of Appeal's conclusion that the failure of law enforcement officers to obtain a search warrant in this case violated the Fourth Amendment and mandates a reversal of the respondent's conviction for possession of marihuana for sale.

The facts are not in dispute. On November 8, 1977, United States customs officials in New York City were alerted by specially trained police dogs of the possible presence of marihuana in two packages mailed from Germany to Merced, Cal. Pursuant to customs laws, officials of the Postal Serv-

ice and the Drug Enforcement Administration opened the packages and confirmed that they contained hashish. The packages were then resealed and sent to authorities in California. Postal authorities and local California officials arranged for a controlled delivery of the packages and obtained a search warrant authorizing them to enter the place of delivery and to search for and seize the packages and their contents. The packages were delivered, and in order to allow the occupants time to open the packages and exercise dominion and control over the contents, the police did not immediately execute the search warrant. Approximately 15 minutes after the packages were delivered, the respondent and two companions arrived by automobile at the residence and left almost immediately thereafter with the packages. While some police remained at the residence and executed the search warrant, others followed the respondent and his companions in the hopes that they would lead them to other suspects. Eventually, the police, fearful that they would lose the suspects in heavy traffic, stopped the automobile and arrested the respondent and his companions. The packages were in plain view in the back seat and were seized at the time of arrest. The packages were in the same condition as they were before the delivery to the home. They were transported to Merced that evening where they were photographed, opened, and inventoried. No second search warrant was obtained before the reopening of the packages. The hashish was still in the packages. The street value of the hashish was $100,000.

A majority of the California Court of Appeal held that the seizure by the police of the packages containing the hashish was valid but the subsequent reopening of the packages at the police station without a search warrant violated the Fourth Amendment. Its holding rested on this Court's decision in *United States* v. *Chadwick*, 433 U. S. 1 (1977), and its progeny, particularly *Walter* v. *United States*, 447 U. S. 649 (1980). Judge Andreen wrote separately concurring in the result but questioning the wisdom of the majority's opin-

ion and its rejection of the State's argument that the respondent had a lesser expectation of privacy because the packages had previously been subjected to a customs search and determined to contain contraband. Accordingly, the packages could move through the mail only by virtue of governmental authorization. Were it not for an earlier decision by a panel of that court which Judge Andreen considered controlling, he would hold that the packages were in the constructive possession of the law enforcement officers from the time of the opening of them in New York until the subsequent stop of the automobile. Three of the seven justices of the Supreme Court of California voted to grant a hearing at the request of the State.

There are three pertinent inquiries which are usually made in evaluating a request for stay of enforcement of an order of a state court: whether that order is predicated on federal as opposed to state grounds; whether the "balance of equities" militates in favor of the relief requested by the applicant; and whether it is likely that four Justices of this Court would vote to grant certiorari. I conclude here that each of these questions must be answered in the affirmative.

First, the decision of the California Court of Appeal is predicated on the Federal Constitution. The opinion refers specifically to the Fourth Amendment and relies for support on federal cases and state cases addressing the federal constitutional issue.

Second, the "balance of equities" favors the granting of the stay. The State argues that unless the requested stay is granted under present California law the case must either be set for retrial or dismissed. The State will therefore be denied the opportunity to have the Court of Appeal's decision reviewed by this Court. By contrast, the prejudice to the respondent is less. The State asserts without contradiction that respondent has been free on bail since his conviction.

Finally, I conclude that it is likely that four Justices of this Court will vote to grant certiorari. The case presents

important issues regarding the level of expectation of privacy a recipient of a package containing contraband sent through the international mails may have when the packages have previously been subjected to a *lawful* customs search and delivered under controlled conditions and constant surveillance. None of our prior cases have directly addressed this oft recurring situation and certainly none of the three opinions in *Walter* v. *United States, supra,* provides a ready answer. In my opinion, the case presents issues which are of sufficient importance that four Justices of this Court would likely vote to grant the State's petition for certiorari.

The request for a stay of the judgment of the California Court of Appeal pending consideration of a timely petition for certiorari by the applicant is granted, to remain in effect until disposition of the petition for certiorari. If the petition is granted, the stay is to remain in effect until this Court decides the case or until this Court otherwise orders.

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GOVERNMENT EMPLOYEES. See **Constitutional Law,** III; **Judges; Jurisdiction,** 2; **Limitation of Actions.**

HABEAS CORPUS. See also **Stays,** 2.

State prisoner—Federal relief—State-court determinations—Presumption of correctness.—In view of provisions of 28 U. S. C. § 2254 (d) regarding presumption in state prisoner's federal habeas corpus proceedings of correctness of state-court determination of fact issue, Federal Court of Appeals erred in concluding, on basis of state trial-court record, that pretrial photographic identification of prisoner was improper, since (1) on same record, state appellate court, in affirming conviction, had reached a contrary conclusion after plenary consideration of question which was first raised on appeal, and (2) federal court's opinion contained no references to either § 2254 (d) or state-court findings and no reasoning to show why "presumption of correctness" was not applicable. Sumner v. Mata, p. 539.

HARBOR WORKERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

HEARINGS IN EXTRADITION PROCEEDINGS. See **Constitutional Law,** II.

HEARINGS TO DETERMINE RELIABILITY OF IDENTIFICATION EVIDENCE. See **Constitutional Law,** V, 3.

IDENTIFICATION EVIDENCE. See **Constitutional Law,** V, 3.

ILLEGAL ALIENS. See **Constitutional Law,** X, 2.

ILLINOIS. See **Constitutional Law,** V, 4.

IMMIGRATION AND NATIONALITY ACT OF 1952.

Revocation of citizenship—Failure to disclose service as concentration camp guard.—Petitioner's citizenship, obtained in 1970 on basis of his 1949 visa papers and his naturalization application—none of such documents having disclosed his service during World War II as an armed guard at a Nazi concentration camp—must be revoked under § 340 (a) of Act because it was "illegally procured." Fedorenko v. United States, p. 490.

IMMUNITY OF JUDGES FROM DAMAGES LIABILITY. See **Civil Rights Act of 1871**, 2.

IMPARTIAL JUDGES. See **Judges.**

INCIDENTS OF OWNERSHIP. See **Constitutional Law**, XI.

INCOME TAXES. See **Constitutional Law**, V, 1.

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INJUNCTIONS. See also **Stays**, 1.

Anti-Injunction Act—Enforcement of water permit—Earlier state-court proceeding.—Anti-Injunction Act prohibits Federal District Court, in action by respondent merchants involved in California landowner's sale of water to Mexico, from enjoining petitioner county from enforcing permit issued to owner which allowed sale of water only for use within county, where county had earlier obtained a state-court injunction prohibiting owner from violating permit and it was not determined that respondents were "strangers" to state-court proceeding. County of Imperial v. Munoz, p. 54.

INSURANCE. See **Conflict of Laws.**

INTEREST ON INTERPLEADER FUNDS. See **Constitutional Law**, XI.

INTERLOCUTORY ORDERS. See **Mandamus.**

INTERNAL REVENUE CODE. See **Constitutional Law**, V, 1.

INTERNAL REVENUE SERVICE.

Tax investigation—Summons—Documents prepared by taxpayer's attorneys.—In an action to enforce an Internal Revenue Service tax-investigation summons, questionnaires sent to corporate taxpayer's employees by corporation's attorneys during internal investigation of payments to foreign government officials, and attorneys' memoranda and notes of interviews with corporation's officers and employees, are covered by attorney-client privilege insofar as responses to questionnaires and any notes reflecting responses to interview questions were concerned, including responses made by corporate personnel who did not control corporation's actions; and notes and memoranda of interviews, insofar as they revealed attorneys' mental processes in evaluating communications, constitute work product that cannot be disclosed simply on Government's showing of substantial need or inability to obtain equivalent without undue hardship. Upjohn Co. v. United States, p. 383.

INTERPLEADER FUNDS. See **Constitutional Law**, XI.

INTERSTATE AGREEMENT ON DETAINERS. See **Constitutional Law**, II.

INTERSTATE COMMERCE. See **Administrative Procedure Act; Constitutional Law, I.**

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INTERSTATE EXTRADITION. See **Constitutional Law, VII.**

INVESTIGATIVE STOP OF VEHICLE. See **Constitutional Law, X, 2.**

JUDGES. See also **Civil Rights Act of 1871, 2; Constitutional Law, III; Jurisdiction, 2.**

Disqualification—Rule of Necessity—Actions challenging "freeze" of federal judges' salaries.—Because of common-law Rule of Necessity, 28 U. S. C. § 455—which requires disqualification of federal judge in proceedings where his impartiality might reasonably be questioned or where he has a financial interest in subject matter or is a party to proceedings—does not operate to disqualify all federal judges, including Supreme Court Justices, from deciding class actions by federal judges against United States challenging validity under Compensation Clause of Constitution of federal statutes that stopped or reduced previously authorized statutory cost-of-living pay increases for high-level federal officials, including federal judges. United States v. Will, p. 200.

JUDICIAL IMMUNITY. See **Civil Rights Act of 1871, 2.**

JUDICIAL REVIEW. See also **Administrative Procedure Act.**

ICC order—Railroad rates for recyclable materials.—Upon review of Interstate Commerce Commission's order under Railroad Revitalization and Regulatory Reform Act of 1976, which order found that rail rates for recyclable and competing virgin materials unjustly discriminated against certain recyclables and permitted railroads to raise rates if new rates did not produce revenue in excess of 180% ratio between revenue and variable cost, Court of Appeals had power to order further proceedings to determine propriety of 180% ratio standard, but had no power to revoke rates implemented under standard or to enjoin further increases toward 180% level. Consolidated Rail Corp. v. National Assn. of Recycling Industries, Inc., p. 609.

JURISDICTION. See also **Constitutional Law, VII; Stays, 2.**

1. *Court of Appeals—District Court order—Denial of disqualification of opposing party's counsel.*—District court orders denying motions to disqualify the opposing party's counsel in a civil case are not appealable "final decisions" under 28 U. S. C. § 1291, and thus Court of Appeals was without jurisdiction to consider merits of District Court's order denying defendant manufacturer's motion to disqualify plaintiffs' lead counsel in product-liability litigation for alleged conflict of interest arising from fact that manufacturer's liability insurer was also an occasional client of counsel's law firm. Firestone Tire & Rubber Co. v. Risjord, p. 368.

JURISDICTION—Continued.

2. *Supreme Court—District Court judgments—Actions challenging "freeze" of federal judges' salaries.*—Under 28 U. S. C. § 1251, Supreme Court has jurisdiction of appeals from District Court's judgments in class actions by federal judges against United States holding unconstitutional federal statutes that stopped or reduced previously authorized statutory cost-of-living pay increases for high-level federal officials, including federal judges, and District Court had jurisdiction under 28 U. S. C. § 1346 (a)(2), which confers jurisdiction over actions against United States based on Constitution when amount in controversy does not exceed $10,000, none of individual claims here having been alleged to have exceeded that amount. United States v. Will, p. 200.

KENTUCKY. See **Constitutional Law**, V, 3; VIII.

LIMITATION OF ACTIONS.

Employment discrimination—Actions under Civil Rights Acts.—Where (1) state college's board of trustees decided to deny professor tenure and notified him on June 26, 1974, that he would be offered a 1-year terminal contract that would expire June 30, 1975, (2) board notified professor on September 12, 1974, of denial of his grievance, (3) on April 18, 1975, Equal Employment Opportunity Commission accepted his complaint charging discrimination in violation of Title VII of Civil Rights Act of 1964, and (4) after receiving Commission's right-to-sue letter, professor filed action in District Court on September 9, 1977, alleging discrimination on basis of national origin in violation of both Title VII and 42 U. S. C. § 1981, his claims were untimely under both Title VII's requirement that a complaint be filed with Commission within 180 days after alleged unlawful employment practice occurred and requirement of applicable state statute of limitations that § 1981 action be filed within three years of unfavorable employment decision, since only alleged discrimination occurred—and limitations periods therefore commenced—when tenure decision was made and communicated to professor on June 26, 1974. Delaware State College v. Ricks, p. 250.

LOANS. See **Securities Regulation.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Disability benefits—Determination of amount.—Employee's recovery for permanent partial loss of use of a leg is limited by Act's schedule specifying method of calculation of compensation for such an injury, and § 8 (c)(21)'s provision of a method of calculation in "all other cases" does not authorize an alternative method for computing benefits for permanent partial disabilities covered by schedule. Potomac Electric Power Co. v. Director, OWCP, p. 268.

LONG-TERM CAPITAL GAINS. See **Constitutional Law**, V, 1.

MAIL FRAUD. See **Criminal Law.**

MAIL SEARCHES. See **Stays**, 3.

MANDAMUS.

New-trial order—Propriety of mandamus relief.—Where District Court, because of error in its evidentiary rulings in respondent's private antitrust action, had entered a nonappealable interlocutory new-trial order after return of jury verdict for respondent, Court of Appeals erred in issuing writ of mandamus directing restoration of verdict as to liability but permitting a new trial on damages, a trial court's new-trial order being reviewable on direct appeal after final judgment and rarely, if ever, justifying mandamus. Allied Chemical Corp. v. Daiflon, Inc., p. 33.

MILK CONTAINERS. See **Constitutional Law**, I; VI, 1.

MINIMUM TAX. See **Constitutional Law**, V, 1.

MINING. See **Federal Water Pollution Control Act.**

MINNESOTA. See **Conflict of Laws; Constitutional Law**, I; VI, 1.

MISSOURI. See **Civil Rights Act of 1871**, 1.

MOTORISTS. See **Conflict of Laws.**

MULTIPLE PUNISHMENT. See **Constitutional Law**, IV.

MULTIPLE TRIALS. See **Constitutional Law**, IV.

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"OFFER" OF SECURITIES. See **Securities Regulation.**

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PRIVACY RIGHTS. See **Constitutional Law**, X, 2.

PRIVILEGED COMMUNICATIONS. See **Internal Revenue Service.**

PROBABLE CAUSE. See **Constitutional Law**, X, 1.

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PRODUCT-LIABILITY ACTIONS. See **Jurisdiction**, 1.

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PUBLIC EMPLOYEES. See **Constitutional Law**, III; **Judges; Jurisdiction**, 2; **Limitation of Actions.**

RADIO COVERAGE OF CRIMINAL TRIALS. See **Constitutional Law**, V, 2.

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RAILROAD RETIREMENT ACT OF 1974. See **Constitutional Law**, VI, 2.

RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976. See **Judicial Review.**

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SECURITIES REGULATION.

Securities Act of 1933—Fraud—Pledge of stock as an "offer or sale."—In view of definitions in § 2 (3) of Securities Act of 1933, a borrower's pledge of stock to a bank as collateral for a loan is an "offer or sale" of a security under § 17 (a), which prohibits fraud in "offer or sale" of any securities. Rubin v. United States, p. 424.

SEGREGATION OF PRISONERS. See **Constitutional Law**, V, 4.

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STAYS.

1. *Injunction—Overcrowding in state prison.*—Application to stay District Court's injunction requiring Oregon officials to eliminate overcrowding in a certain prison by reducing number of prisoners housed there by specified amounts by specified dates, is granted. Atiyeh v. Capps (REHNQUIST, J., in chambers), p. 1312.

2. *Mandate of Court of Appeals—Habeas corpus proceedings.*—Application to stay mandate of Court of Appeals—which had reversed District Court's judgment dismissing respondent state prisoner's habeas corpus petition—is granted, since apparently no certificate of probable cause for appeal to Court of Appeals from District Court's order, as required by 28 U. S. C. § 2253, had been issued. McCarthy v. Harper (REHNQUIST, J., in chambers), p. 1309.

3. *Reversal of drug conviction—Violation of Fourth Amendment.*—Application to stay California Court of Appeal's judgment reversing respondent's state drug conviction on ground that Fourth Amendment was violated by search and seizure involving discovery of hashish in mailed packages and subsequent "controlled" delivery of packages, is granted. California v. Riegler (REHNQUIST, J., in chambers), p. 1319.

4. *Sex discrimination—Boys' basketball teams.*—Application to vacate Court of Appeals' stay pending appeal of District Court's preliminary injunction requiring respondent school officials to allow plaintiff-applicant, a female junior high school student, to try out for boys' basketball teams, is denied. O'Connor v. Board of Ed. of School Dist. 23 (STEVENS, J., in chambers), p. 1301.

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1. *"All other cases."* § 8 (c)(21), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 908 (c)(21). Potomac Electric Power Co. v. Director, OWCP, p. 268.

2. *"Charges shall not be made public."* § 706 (b), Civil Rights Act of 1964, 42 U. S. C. § 2000e–5 (b). EEOC v. Associated Dry Goods Corp., p. 590.

3. *"Dangerous special offender."* Organized Crime Control Act of 1970, 18 U. S. C. § 3575. United States v. DiFrancesco, p. 117.

4. *"Disposition of . . . interest in a security, for value."* § 2 (3), Securities Act of 1933, 15 U. S. C. § 77b (3). Rubin v. United States, p. 424.

5. *"Final agency action."* § 10 (c), Administrative Procedure Act, 5 U. S. C. § 704. FTC v. Standard Oil Co. of Cal., p. 232.

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8. *"Illegally procured."* § 340 (a), Immigration and Nationality Act of 1952, 8 U. S. C. § 1451 (a). Fedorenko v. United States, p. 490.

9. *"Injunction to stay proceedings in a State court."* Anti-Injunction Act, 28 U. S. C. § 2283. County of Imperial v. Munoz, p. 54.

10. *"Offer or sale of any securities."* § 17 (a), Securities Act of 1933, 15 U. S. C. § 77q (a). Rubin v. United States, p. 424.

11. *"To make public."* § 709 (e), Civil Rights Act of 1964, 42 U. S. C. § 2000e–8 (e). EEOC v. Associated Dry Goods Corp., p. 590.

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